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*Robert G. Rogers and E. Spivey Gault*

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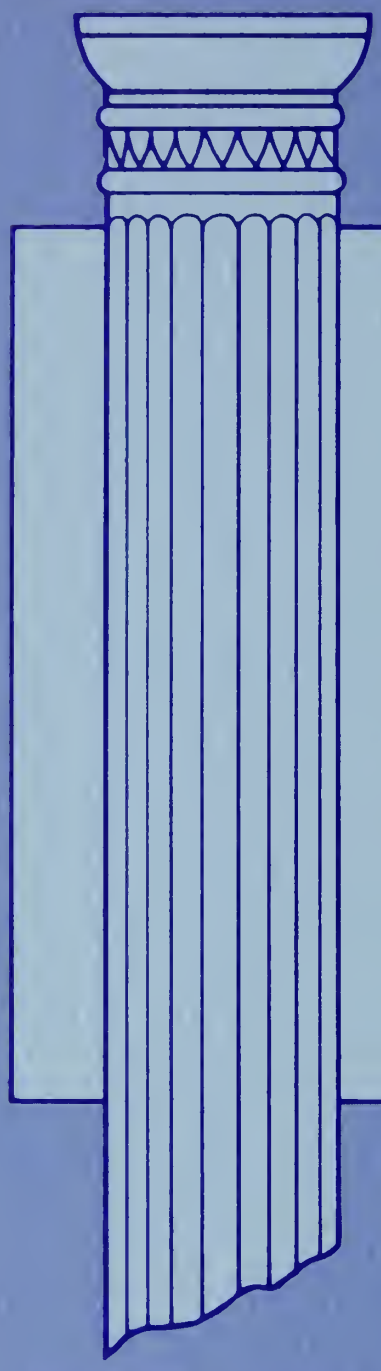

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# Mississippi Law Journal

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**HUGH C. "BUZZY" CLAYTON**

**EDITOR-IN-CHIEF OF THE**
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**1970**

# In Memoriam

It is always difficult to reflect objectively or adequately upon the loss of a friend. A natural inclination is to magnify his achievements and to make him seem greater than he was. But in the meaningful life of Hugh "Buzzy" Clayton, we find one who lived without pretense and with such a spirit of giving that his accomplishments seem only natural. Rarely does a man come upon the scene who near the outset of his career is recognized by his contemporaries as possessing such a combination of wisdom, enthusiasm and happiness that he has found the secret of life; the man to whom we dedicate this issue of the *Mississippi Law Journal* was one such rare person.

Buzzy died July 16, 1972, after courageously fighting leukemia for a year and a half. But in the 27 full, rich years spent with us he accomplished his task, and we commend to all the pattern of his life and his high moral courage.

It is particularly fitting that the *Mississippi Law Journal* pay honor to Buzzy's memory, for no Editor-in-Chief ever championed its cause more than he. In 1970 he followed in the footsteps of his illustrious father, Hugh N. Clayton of New Albany, Mississippi, bringing about the only "father-son" combination on the roster of *Mississippi Law Journal* Editors. As Editor, Buzzy particularly believed in and promoted freedom of thought. He relished an intelligent debate, whether verbal or in print, and he strongly supported, by deeds as well as words, the Law Journal's long-standing policy of freedom to its article contributors.

As a law student, Buzzy earned the respect of both the faculty and his fellow students. Never devious, he was always frank and open. He had a generous and warm nature that caused others to confide in him and to seek him out for advice. After serving one term as President of his legal fraternity, Phi Delta Phi, he was asked by unanimous vote of his brothers to serve another term, which he did. He always took genuine pleasure in making new friends and delighted in fellowship with others; he was immensely popular. His personality and sterling character brought forth a big man in every sense—intellectually, physically, morally and spiritually.

All of his life Buzzy was enriched by his heritage. His parents, who survive him, surrounded him with love, but encouraged his independence and initiative as a youth. As a Boy Scout, Buzzy earned Eagle Scout rank, and in the process further developed his rapidly-maturing character.

At Ole Miss, as an undergraduate, he was R.O.T.C. Cadet Colonel, a member of Scabbard & Blade, and recipient of the Chancellor's Award, as the most outstanding R.O.T.C. student. His social fraternity was Phi Delta Theta. His achievements as an undergraduate and as a law student caused him to be listed in Who's Who in American Colleges and Universities and to be inducted into Omicron Delta Kappa, honorary leadership fraternity.

Upon graduation from law school in 1970, he briefly served in the United States Army as a commissioned officer, and then commenced the practice of law in New Albany. In January, 1972, he took office as County Attorney for Union County, having been elected in 1971. At the time of his death Buzzy was a member of the Official Board of the First United Methodist Church in New Albany, and was Director-elect of the Rotary Club. He was District Chairman of the Boy Scouts, and was listed in "Outstanding Young Men in America."

His wife, Carolyn, and his daughter, Emily, crowned Buzzy's life with joy. He was a loving husband and father, and Carolyn and Emily know that they are not alone now, for they have been lifted up by countless manifestations of love that have poured forth from a legion of friends.

In addition to his parents, wife, and child, Buzzy is survived by one sister, Rose. She is the wife of the Honorable Thad Cochran, member of the United States House of Representatives. Rose and Thad, along with Buzzy's parents, also have been buoyed by a tender outpouring of love.

All of Buzzy's family and friends will miss him, of course, but they know that he would want us to be cheerful, filling every hour with the joy of living—as he did. He was, truly, a man with sunshine in his soul.

It is, then, with love and esteem that we dedicate this issue of the *Mississippi Law Journal* to one who served his fellow man with dignity, courtesy and good deeds—Hugh "Buzzy" Clayton.

Editor's note: These remarks were prepared by Hon. J. Jerry Langford, of the law firm of Wells, Wells, Marble & Hurst, Jackson, Mississippi; Mr. Langford served immediately prior to Hugh "Buzzy" Clayton as Editor-in-Chief of the *Mississippi Law Journal*.

# MISSISSIPPI COMPULSORY FIELD-WIDE UNITIZATION

*Robert G. Rogers* and E. Spivey Gault***

## Introduction

> The purpose of conservation legislation is the prevention of waste in order to achieve the greatest ultimate economic recovery of oil and gas and the protection of the correlative rights of diverse surface owners whose properties overlie a common source of supply.[1]

The history of conservation legislation reflects scientific advances in determining the nature of oil and gas resources in their natural state.[2] In the early days of oil and gas production, when little was known of their nature, the courts analogized the situation to that involving ownership of wild animals, holding that ownership was dependent upon "capture," *i.e.*, physical possession.[3] This period has been characterized as being a " 'git there fustest with the mostest' wells" type of development.[4] However, as advancing knowledge of oil and gas technology began to show the waste inherent in unrestricted development and production, the need for a more regulated planned development became apparent. The basic problem was that given the fact that proper development of oil and gas resources could not be accomplished within the framework of established property laws which required the respecting of boundary lines, how were the various interests of those owners who shared a common pool or reservoir to be equitably combined into a unit that would allow the maximum total recovery with a minimum of waste. Voluntary agreements[5] were, and still are,[6] a viable

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*B.S. 1958, Mississippi State University; J.D. 1963, University of Southern California; L.L.M. 1972, Tulane University. Gribben, Swann & Glass; Miami, Florida.

**Editorial Board, *Mississippi Law Journal.*

[1] R. Sullivan, Handbook of Oil and Gas Law 252 (1956).

[2] *Id.* at 253.

[3] Myers, *The Necessity of Unitization,* 33 Miss. L.J. 1 (1961). For a good discussion of the doctrine of "capture" and the development of conservation legislation, *see* Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes,* 13 Miss. L.J. 353 (1941).

[4] Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 Miss. L.J. 267 (1947).

[5] A discussion of voluntary pooling or unitization agreements is beyond the scope of this paper. For an in-depth analysis of these agreements, see L. Hoffman, Voluntary Pooling and Unitization (1954) [hereinafter cited as Hoffman].

[6] The 1948 Compulsory Pooling Act is specifically limited to those situations where a voluntary agreement has not been reached. Miss. Code Ann. § 6132-22 (a) (1952).

method of achieving the desired goal. Experience has shown, however, the necessity for some type of compulsory method to handle those situations in which voluntary agreement is not workable. State interests[7] as well as the interests of the individual owners demand that waste be minimized in *all* situations, including those where voluntary agreement can not be reached.

Recognizing this problem, the Mississippi Legislature established the State Oil and Gas Board in 1932 to aid in the conservation of natural resources and to encourage their development.[8] Although the board had the authority to enforce well-spacing provisions,[9] until 1948 it did not have the power to force nonconsenting owners into units of sufficient size to allow proper development. In 1948 the legislature enacted a compulsory pooling law giving the state Oil and Gas Board the power to integrate separate tracts into drilling units.[10] This act was amended in 1950 to eliminate a troublesome 40 acre limitation on the board's authority to compel pooling.[11]

The 1948 act expressly repealed the 1932 act, but it did not immediately disturb units established prior to its enactment.[12] As a result there was a gap in the board's power to compel pooling under the 1948 act.[13] In a series of cases in the early 1950's[14] the Mississippi

---

The 1964 Compulsory Unitization Act requires voluntary agreement by the owners of lessees of at least 85 percent of the interest in the proposed unit. MISS. CODE ANN. § 6132-104 (Supp. 1972).

[7]The state's interest is in the conservation of its natural resources, and its authority to regulate their use is based on its police power. Myers, *The Necessity of Unitization,* 33 MISS. L.J. 1, 3 (1961).

[8]Act of May 18, 1932, ch.117, §§ 1-48, [1932] Gen. Laws Miss. 351.

[9]California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946).

[10]MISS CODE ANN. §§ 6132-01 to -21, -23 to -36 (1952).

[11]*Id.* § 6132-22. Prior to this amendment, the section specified that "[T]he board may . . . *as to a drilling unit of forty (40) acres or less, but as to no drilling unit of greater area,* require such persons to integrate their interest and to develop their lands as a drilling unit." (emphasis added). The emphasized portions were deleted by the 1950 amendment.

[12]*Id.* § 6132-35.

[13]The gap was that under the 1932 act the board could promulgate and enforce well-spacing rules, but had no means of accomodating the rights of owners in tracts smaller than the established spacing pattern. Gillis, *Involuntary Equitable Pooling in Mississippi,* 27 MISS. L.J. 10, 14 (1955) [hereinafter cited as Gillis].

[14]Humble Oil & Ref. Co. v. Hutchins, 217 Miss. 636, 64 So. 2d 733 (1953); Superior Oil Co. v. Beery, 216 Miss. 664, 63 So. 2d 115 (1953), *suggestion of error overruled,* 64 So. 2d 357 (1953); Hessie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952); Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So. 2d 518 (1952).

Supreme Court established the doctrine of equitable pooling[15] to fill this gap.

In 1964, in a move which was heralded as a step forward for conservation interests,[16] the Mississippi Legislature enacted a compulsory field-wide unitization act.[17] Experience has shown that, due to various limitations contained within the 1964 act,[18] the utility of field-wide compulsory unitization was greatly impaired. In fact, only one field was unitized under it.[19] In an attempt to correct some of the constrictive limitations and make compulsory unitization a more feasible solution, the legislature passed House bill 548 on April 24, 1972.[20] The purpose of this article is to examine the scope and probable effect of these changes.

Any analytical assessment of compulsory unitization as it exists now must of necessity be premised upon the idea that it is only one part of a total scheme of oil and gas regulation — a scheme designed to promote maximum recovery of resources by minimizing waste through the employment of the most advanced technological methodology, with resultant benefit not only to those with property interests in the common reservoir, but also those whose primary interest is avoiding waste.

---

[15]The term "equitable" pooling comes from the court's citing a number of the maxims of equity in the first of these decisions, Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So. 2d 518 (1952). *See* Gillis, *supra* note 13, at 14 & n.26. However, another explanation is that:

> [T]he term 'equitable' may have been applied to this kind of pooling because it is neither voluntary (by agreement) nor compulsory under a specific provision of a statute. 'Judicial pooling' might be more appropriate since the Mississippi court effected pooling probably not contemplated by the parties, not by the legislature that passed the conservation statute.

6 H. Williams & C. Meyers, Oil and Gas Law § 906, at 36-37 (Supp. 1972) [hereinafter cited as Williams & Meyers].

[16]Custy & Knowlton, *Compulsory Field-Wide Unitization Comes to Mississippi*, 36 Miss. L.J. 123, 140 (1965) [hereinafter cited as Custy & Knowlton].

[17]Act of June 5, 1964, ch. 236, [1964] Gen. Laws Miss. 247.

[18]*See, e.g., id.* § 1 (consent requirement), § 2 (f) ("completely and fully drilled out requirement"), § 3 (c) (drilling requirement), § 6 (voiding leases), § 10 (appeal procedures).

[19]Interviews with Representative John Neill of Laurel, Mississippi, Chairman of the House Committee on Oil and Gas, Mississippi Legislature, on April 9 and 16, 1972. [hereinafter cited as Interview with Representative Neill].

[20]Act of Apr. 24, 1972, ch. 365, [1972] Gen. Laws Miss. 57, *amending* Miss. Code Ann. §§ 6132-101, -102, -103, -106, -110 (Supp. 1971) (codified at Miss. Code Ann. §§ 6132 -101, -102, -103, -106, -110 (Supp. 1972)).

## COMPULSORY PROVISIONS IN MISSISSIPPI

### *In General*

Under current law, case and statutory, there are three possible means (excluding voluntary agreement) [21] of combining separate mineral interests in a tract or tracts of land into one developable oil or gas unit:

(1) Compulsory pooling – 1948 act as amended in 1950;
(2) Equitable pooling – Mississippi Supreme Court decisions, 1952-53;
(3) Compulsory unitization – 1964 act as amended in 1972.

By using either pooling or unitization an oil and gas reservoir can be developed as if held by a single owner, with expenses as well as proceeds being allocated among the several parties in accordance with the formula prescribed by the order or agreement. While the general purposes of pooling and unitization are the same,[22] the specific purpose and the technological basis for each is separate and distinct.

"Pooling" refers to the consolidation of several small tracts into one unit (a "drilling unit") upon which one well will be drilled.[23] The purposes of pooling are to prevent waste, both physical and economic, that accompanies the drilling of unnecessary wells[24] and to protect those landowners with interests in a common reservoir.[25] Its technological basis is found in well-spacing regulations,[26] and it is designed to provide a method whereby owners with tracts smaller than that required for a drilling unit under well-spacing provisions can combine their interests into a tract of developable size. Pooling basically involves control of

---

[21] *See* note 5 *supra.*

[22] *E.g.,* the conservation of oil and gas resources, the prevention of waste, and the protection of correlative rights. MISS. CODE ANN. §§ 6132-101, -102 (Supp. 1972) (unitization) and § 6132-01 (1952) (pooling).

[23] Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85 (1952).

[24] In regard to the question of what is an unnecessary well, one writer has stated that "any well drilled upon a tract smaller than that established by the spacing rule is an unnecessary well." Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267, 268 (1947).

[25] 6 WILLIAMS & MEYERS, *supra* note 15, § 901, at 3.

[26] The necessity for well-spacing regulations is based on

> a well established petroleum engineering principle that the regular and uniform spacing of wells will result in the even and uniform utilization of the reservoir pressure, and, therefore, will result in an orderly and uniform use of such reservoir energy . . . ; so that when the available reservoir energy has been exhausted, the maximum quantity of oil will have been lifted from the subterranean formations to the resultant benefit alike [of] minerals owners, lessees, the state and the general public.

Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes,* 13 MISS. L.J. 353, 380 (1941).

well spacing to passively utilize reservoir pressure and to maximize *primary* recovery.

"Unitization" refers to the consolidation of all, or substantially all, of the drilling units in an entire field (*i.e.*, all wells over a common oil or gas reservoir).[27] The purpose of unitization is to allow the entire field to be operated as a single unit, without regard to surface boundary lines, so that operations such as gas cycling, pressure maintenance, and secondary recovery can be more effectively conducted.[28] The importance of secondary recovery operations[29] in oil and gas production is now established beyond question,[30] and a unitized operation is necessary to insure effective functioning.[31] Unitization is therefore mainly involved with the prevention of waste during the *secondary* recovery phase by actively creating or maintaining reservoir pressure through coordination of all wells over a common reservoir.

The difference between pooling and unitization demonstrates that both are necessary in a modern, comprehensive oil and gas conservation scheme. If the goal of maximum production with minimum waste is to be realized, conservation authorities must have the power to regulate secondary as well as primary recovery. Whether the Mississippi conservation authority (State Oil and Gas Board) actually has this power must be considered in the light of the other compulsory remedies.

### *Compulsory Pooling*

The argument for compulsory pooling[32] has been succinctly stated many times. Briefly it is as follows:

---

[27] 6 WILLIAMS & MYERS, *supra* note 15, § 901, at 2; Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267, 271 (1947).

[28] 6 WILLIAMS & MEYERS, *supra* note 15, § 901, at 3-4. For a more complete listing of all of the purposes for which unitization can be used *see* Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267, 272 (1947).

[29] The term "secondary recovery phase" refers to the production after the primary recovery phase is over, i.e., after the exhaustion of production by natural flow and artificial lift. Myers, *The Necessity of Unitization,* 33 MISS. L.J. 1,4 (1961).

[30] *See, e.g., id.* at 6; Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267, 272 (1947). A recent example of increased production through unitized secondary recovery operations was the Little Creek field. Information supplied by Representative Neill showed that the before-unitization estimate was that production in the Little Creek field would taper off to zero by the beginning of 1967. However, unitized operation of the field has increased daily production by 7,000 barrels a day, cumulative production by 12,000,000 barrels, and the well has remained productive through 1971. Interview with Representative Neill, *supra* note 19.

[31] 6 WILLIAMS & MEYERS, *supra* note 15, § 901, at 4.

[32] For a detailed analysis of the 1964 Compulsory Pooling Act *see* Custy & Knowlton, *supra* note 16.

> (1) Excessive drilling is wasteful both in terms of the cost of drilling unnecessary wells (economic waste) and in terms of unnecessary and undesirable dissipation of native reservoir energy resulting in loss of otherwise producible hydrocarbons (physical waste).
>
> (2) To prevent such physical and economic waste, drilling of wells should be limited and a uniform well-spacing pattern established, e.g., one well for 20 or 40 or 80 acres.
>
> (3) The owner of a tract of land too small to be entitled to a well permit under the applicable spacing rule is entitled, however, to a fair chance to recover the hydrocarbons in place beneath his land. To deny him the right to drill a well, without otherwise affording him some opportunity to realize on the economic value of the hydrocarbons in place, will amount to confiscation of his interest in such hydrocarbons. But to permit him to drill a well on his small tract will result in waste.
>
> (4) The solution to the dilemna posed by the problem of the small tract is compulsory process to require the pooling of small tracts into a drilling unit of the size specified by the applicable spacing rule.[33]

Mississippi's Compulsory Pooling Act is similar to that of other states.[34] It gives the State Oil and Gas Board, as a regulatory agency, "jurisdiction and authority over all persons and property necessary to administer and enforce effectively the provisions of this act and all other acts relating to the conservation of oil and gas."[35]

Specifically, the act empowers the board to establish drilling units and to require those persons who have not agreed[36] to integrate their interests to do so "for the prevention of waste or to avoid the drilling of unnecessary wells. . . ."[37]

Once the drilling unit has been established and the interests pooled, the cost of development and operation[38] of the unit is shared pro rata by each mineral interest owner,[39] with each entitled to his proportionate share of the well production.[40] One notable exception to this

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[33]6 WILLIAMS & MEYERS, *supra* note 15, § 905, at 14.

[34]For a complete list of the states with compulsory pooling provisions *see* 1 R. MYERS, THE LAW OF POOLING AND UNITIZATION 264-65 (1967) [hereinafter cited as MYERS].

[35]MISS. CODE ANN. § 6132-10 (a) (Supp. 1972).

[36]Voluntary agreements are still expressly permitted, *id.* § 6132-22 (a), but they must be approved by the board. *Id.* § 6132-23. *See also* note 5 *supra.*

[37]*Id.* § 6132-22 (a).

[38]"Cost of development and operation" is limited to "the actual expenditures required for such [development and operation], not in excess of what are reasonable, including a reasonable charge for supervision . . . ." *Id.* § 6132-22 (a).

[39]*Id.*

[40]*Id.* § 6132-22 (b).

rule is that "when production of oil or gas is not secured in paying quantities as a result of such forced unitization, the operator shall have no charge against the nonconsenting owner or owners."[41] While, of course, no payments will be made to a nonconsenting owner for his working interest in the event of a dry well, royalty payments must still be made on his allocated share of unit production, even though such production is insufficient to reimburse the operator for his costs.[42] It would therefore appear more advantageous for the mineral interest owner to reject any voluntary agreement and force the board to compel pooling.[43]

Mississippi's compulsory pooling law was held to be a constitutionally valid exercise of the state's police power in the 1952 case of *Superior Oil Co. v. Foote*.[44] It was also in this case that the Mississippi Supreme Court demonstrated at least an implied recognition of the necessity for liberal interpretation of the act's provisions. In rejecting the contention that the statutory usage of the word "develop"[45] precluded the board from ordering pooling after a well had already been drilled, the court stated that "this interpretation might prohibit many needed actions of the Board" because "[o]ftentimes the Board, as here, may find it necessary to integrate interests in order to prevent the drilling of unnecessary wells."[46]

Given the 1950 amendment which removed the 40 acre limitation, and the court's liberal interpretation, the doctrine of compulsory pooling occupies an important position in the overall conservation scheme in Mississippi.

### *Equitable Pooling*

Equitable pooling[47] was created by the Mississippi Supreme Court[48] to fill a gap in the State Oil and Gas Board's well-spacing authority.[49]

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[41] *Id.* § 6132-22 (a).

[42] 6 WILLIAMS & MEYERS, *supra* note 15, § 905.2, at 28.

[43] However, the consequences of this may be complete exclusion. *See, e.g.*, California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144 (1963).

[44] 214 Miss. 857, 59 So. 2d 85 (1952).

[45] MISS CODE ANN. § 6132-22 (a) (1952) authorizes the State Oil and Gas Board to "require such persons to integrate their interests and to *develop* their lands as a drilling unit." (emphasis added).

[46] 214 Miss. at 882, 59 So. 2d at 96 (1952).

[47] *See generally* Gillis, *supra* note 13, for a good discussion of equitable pooling in Mississippi.

[48] Cases cited note 14 *supra*.

[49] The gap is discussed in note 13 *supra*.

The doctrine arose as a result of the 1932 conservation act[50] which established the State Oil and Gas Board and empowered it to promulgate conservation rules, including provisions for such "drilling, development, sinking . . . and operation of oil and gas wells as may be necessary to prevent the waste of these products and to protect the common source of supply."[51] This statute was interpreted as giving the State Oil and Gas Board the power to prescribe rules for the spacing of oil and gas wells.[52] Thus under the 1932 act the Oil and Gas Board could enact and enforce well-spacing regulations but could not force compulsory pooling of those interests within a spacing unit because there was no compulsory pooling provision in the act. The inequities possible in this situation were presented to the court in the 1952 case of *Griffith v. Gulf Refining Co.*[53] In this case Magnolia and Gulf each owned a lease covering an undivided one-half interest in a 250-acre tract of land. During the term of these leases, the owner of the surface and reversionary mineral interest conveyed all of his interest in the south 90 acres to Griffith and others, without mention of the leases. The lessees, Magnolia and Gulf, agreed to operate their undivided interests as a single unit and applied to the State Oil and Gas Board for a permit, using the entire 250 acres as a drilling unit. The unit was approved, a permit issued, and the lessees received an "allowable"[54] based on the 250-acre drilling unit. The well was drilled on the north 160-acre tract. When production in paying quantities began, the lessees refused to pay royalties to Griffith and the others who held royalty interests only in the south 90-acre tract because no well was drilled on their tract.[55]

Faced with the basic inequities of this situation, the Mississippi Supreme Court created the doctrine of "equitable pooling" saying:

> On account of the fact that the well is evidently draining the 90 acre tract and that the owners of such acreage are thereby contributing to the production, actually the owners of the 160 acres must be getting more than they are entitled to, and this

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[50]Act of May 18, 1932, ch. 117, [1932] Gen. Laws Miss. 4 (repealed 1948).

[51]*Id.* § 5.

[52]California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 524 (1946).

[53]215 Miss. 15, 60 So. 2d 518 (1952).

[54]"Allowable" refers to the amount of production authorized for each well. MISS. CODE ANN. § 6132-23 (1952). For a more detailed analysis *see* R. SULLIVAN, HANDBOOK OF OIL AND GAS LAW 311 (1956).

[55]The common law rule is that:

> [I]n the absence of language to the contrary contained in the instrument of conveyance, the grantee of subdivided acreage subject to lease will receive royalties only in the event a well is drilled on his tract.

GILLIS, *supra* note 13, at 21.

> at a time, when those on the 90 acre part of the unit are receiving nothing. When these two parcels of land were merged into one drilling unit, *the imaginary line between them was obliterated insofar as the production of gas was concerned.*[56]

Thus the court said that the action of the lessees in securing a permit to drill upon a particular drilling unit was sufficient to (equitably) pool the royalty interests within the unit—a pooling without either a voluntary agreement or a compulsory integration order.[57]

Although the *Griffith* case represented the first step into equitable pooling, many questions remained unanswered.[58] It was not until 1953 and *Superior Oil Co. v. Beery*[59] that the scope of the doctrine of equitable pooling became settled. In *Beery* the court made it clear that equitable pooling was effective for almost every purpose[60] and was not limited to effectuating a sharing of production.

Two other cases, *Humble Oil & Refining Co. v. Hutchins*[61] and *Superior Oil Co. v. Magee,*[62] made it clear that equitable pooling had survived the 1948 compulsory pooling act. These cases involved the drilling of gas wells (which had a 320-acre well-spacing unit) and the pooling of the interests therein. The problem was that the well units were approved under the 1948 compulsory pooling act which limited the board's power to compel pooling to units of 40 acres or less. The court held in both cases that the interests were in fact pooled. As the court said in *Magee*:

> The establishment of drilling units of itself pooled all of the interests in the unit . . . without the necessity of following the alternative administrative procedure provided for in Section 10 (a) of the 1948 Act.[63]

Simply stated, the difference between equitable pooling and compulsory pooling is the authority which compels the pooling. Compulsory pooling is ordered by the Oil and Gas Board; equitable pooling is ordered by the court after the board has established a drilling unit.

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[56]215 Miss. at 27, 60 So. 2d at 521.

[57]HOFFMAN, *supra* note 5, at 262.

[58]Such as whether the equitable pooling was a pooling for all purposes (*i.e.*, perpetuation of a lease, etc.). For a complete examination of the unanswered questions, *see id.* at 266.

[59]216 Miss. 664, 63 So. 2d 115 (1953).

[60]Including perpetuation of unit leases from which there is no production. HOFFMANN, *supra* note 5, at 271.

[61]217 Miss. 636, 64 So. 2d 733 (1953).

[62]227 Miss. 868, 87 So. 2d 280 (1956).

[63]*Id.* at 875, 87 So. 2d at 282.

The future of equitable pooling in Mississippi is unclear. The court in *Beery* indicated that the doctrine may not be applicable to cases arising after the effective dates of the 1948 (for oil wells) and 1950 (for gas wells) statutes which expressly provide for compulsory pooling by the Oil and Gas Board.[64] However, at least one authority has suggested that it may continue to be of significance in situations where, by reason of an alleged procedural failure,[65] a compulsorily pooled unit is threatened with being held invalid.[66]

There is at least one situation in which equitable pooling is not available. In *California Co. v. Britt*[67] the plaintiffs were alleging drainage from their nonunitized tract due to operation of a unitized tract on other premises. The plaintiffs had refused to join in a fair voluntary unitization plan which had been approved by the State Oil and Gas Board. The court held that there was no liability for alleged drainage in this situation and that:

> The equitable pooling doctrine is not applicable because California [the unit operator] has never considered appellees' [Britt's] mineral interest as within the unit, appellees have denied it and have refused to join the unit, they have not executed the unitization agreements, and the order of the board defines the unit as not including interests of owners who are not parties to the unitization. Moreover, in this argument appellees are on the horns of a dilemma: if equitable pooling should apply, appellees' interest would be bound by the unitization agreement, even though they did not sign it, and their rights would be as royalty owners, since their interest was under lease to one of the operating parties until 1954, and production from the unit would have continued the lease thereafter. On the other hand, since Mississippi does not have compulsory pooling, and the equitable pooling doctrine is inapplicable, appellees are not parties to the unitization agreement, have no contractual relationship with California . . . , and there has been no production from a well on appellee's tract.[68]

This case probably represents a refinement of the equitable pooling doctrine. Where an owner is prevented from drilling by a board order and can show drainage, the court, consistent with the equitable pooling decisions, should order an accounting. However, where an owner has resorted to self-help to hold his interests outside a board established unit, the court will probably deny relief.

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[64]HOFFMAN, *supra* note 5, at 271.

[65]Such as failure to give proper notice.

[66]6 WILLIAMS & MEYERS, *supra* note 15, § 906.1, at 43.

[67]247 Miss. 718, 154 So. 2d 144 (1963).

[68]*Id.* at 728-29, 154 So. 2d at 148.

The compulsory and equitable pooling doctrines allow the equitable regulation of oil and gas production during the primary recovery phase. Nevertheless, more legislation was required to complete the conservation cycle.

### *Compulsory Unitization*

"Unitization" involves the combining of all, or substantially all, of the tracts of land over a pool of oil or gas.[69] Its purpose is to achieve maximum *secondary* recovery by operating the entire field as one unit.[70] Technically it involves active creation or maintenance of reservoir pressure by using some wells as input pressure-building wells and others as output or drain wells.[71]

The importance of secondary recovery and pressure maintenance[72] operations is obvious when it is realized that primary recovery techniques account for only 15 to 25 percent of the total resource recoverable.[73] The importance of compulsory unitization is equally obvious since the entire field must be operated as a single unit for secondary recovery or pressure maintenance operations to be most effective. This usually will involve integrating interests.[74]

The following table[75] illustrates the difference in estimated oil recovery with and without the use of secondary methods. In certain cases, the estimated recovery is increased over 100 percent, *e.g.*, McComb and Raleigh fields. In all cases, the recovery is increased substantially.

The need for compulsory field-wide unitization in Mississippi was recognized as early as 1947,[76] but it was not until 1964 that the legislature granted the State Oil and Gas Board the power to compel such unitization.[77] This first compulsory unitization act gave the board

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[69] 1 MYERS, *supra* note 34, at 1.

[70] 6 WILLIAMS & MEYERS, *supra* note 15, § 901, at 3.

[71] For an in-depth analysis of secondary recovery and pressure maintenance operations *see* 1 MYERS, *supra* note 34, at 31-43.

[72] "Secondary recovery" refers to operations conducted after or close to the end of primary recovery operations. "Pressure maintenance" refers to the injection of fluids early in the development of a field and before the natural reservoir pressure has been exhausted. Myers, *The Necessity of Unitization,* 33 MISS. L.J. 1, 5 (1961).

[73] 1 MYERS, *supra* note 34, at 32.

[74] 6 WILLIAMS & MEYERS, *supra* note 15, § 901, at 3-5; Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267, 271-72 (1947).

[75] Interview with Representative Neill, *supra* note 19.

[76] Myers, *Spacing, Pooling and Field-Wide Unitization,* 18 MISS. L.J. 267 (1947).

[77] Act of June 5, 1964, ch. 236, [1964] Gen. Laws Miss. 247.

TABLE 1

| Field | Estimated Total Production Without Secondary Recovery* | Estimated Additional Oil Due to Secondary Recovery* & Percent of Primary Oil | |
|---|---|---|---|
| Brookhaven | 35,000,000 | 33,000,000 | (94%) |
| Tinsley | 39,285,000 | 18,111,000 | (46%) |
| Cranfield | 27,600,000 | 20,400,000 | (74%) |
| Little Creek | 25,000,000 | 21,750,000 | (87%) |
| East Eucutta | 29,000,000 | 10,000,000 | (34%) |
| McComb | 13,050,000 | 16,650,000 | (128%) |
| Raleigh (12,000′) | 7,000,000 | 4,000,000 | (57%) |
| Summerland | 3,200,000 | 1,000,000 | (34%) |
| Raleigh (12,600′) | 900,000 | 2,900,000 | (320%) |
| Summit | 704,000 | 646,000 | (92%) |
| Citane | 175,000 | 125,000 | (71%) |
| | | 128,682,000 | |

*In barrels.

limited authority to compel unitization of a pool. This act, which was heralded as being "in many ways the culmination of [a conservation] effort officially begun in 1932 with Mississippi's first conservation law,"[78] was a definite step forward, but less than ideal in actual practice.[79] In an effort to remedy this situation and to provide a more functional compulsory field-wide unitization remedy, the Mississippi Legislature amended the act during its 1972 session.[80]

The 1964 act authorized the State Oil and Gas Board to order the operation of an entire field of oil or gas as a single unit after giving proper notice and holding a hearing to determine the need for unitized operation.[81] Before the board considered petitions for unitization, it required that the proposal have the approval of 85 percent of the working and royalty interests in the field (excluding royalty interests owned by the lessees).[82] This high percentage requirement has been criticized as being unrealistic when compared to the lower requirements in other states,[83] none of which require over 75 percent and most of which require about 65 percent.[84]

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[78]Custy & Knowlton, *supra* note 16, at 123.

[79]*See, e.g., supra* note 18.

[80]Act of April 24, 1972, ch. 365, [1972] Gen. Laws Miss. 57, *amending,* MISS. CODE ANN. §§ 6132-101, -102, -103, -106, -110 (Supp. 1971).

[81]Act of June 5, 1964, ch. 236, § 1, [1964] Gen. Laws Miss. 247.

[82]*Id.*

[83]Custy & Knowlton, *supra* note 16, at 126-27.

[84]6 WILLIAMS & MEYERS, *supra* note 15, § 913.5, at 117-19.

Notwithstanding criticism, the 1972 amendment maintained the 85 percent level for voluntary approval.[85] The legislature did, however, give some relief by eliminating the requirement that this approval be obtained before the proposed unitization plan could be submitted to the board. The amended procedure permits the petition to be filed with a proposed agreement for operating the field as a unit and with data to support the petition for unitization. If the board approves the petition, this agreement, including any amendments by the board, must then be approved by 85 percent of the lessees and royalty owners.[86]

Section 2 (f) of the 1964 act also substantially limited the board's power to order unitization. It required the board to find, prior to the issuance of a unitization order, that

> the entire "unit area" has been *completely and fully drilled out and developed* by the drilling of one (1) oil well on every forty (40) acres within the boundaries of the unit area, if an oil field or one (1) gas well on every three hundred and twenty (320) acres within the unit area, if a gas field, which units for oil wells shall not exceed forty (40) contiguous surface acres . . . and which units for gas wells shall not exceed three hundred and twenty (320) contiguous surface acres. . . .[87]

As a result of this limitation, the board could not order unitization under the 1964 act prior to the field being "fully drilled out," even if technical data indicated that unit operation would be necessary to prevent substantial loss of production from a pool.

The 1972 act amended this section to give the board more flexibility in deciding *when* to order unitization. The section now provides that the board must find

> that the operators of such unit shall have drilled a sufficient number of wells to a sufficient depth and at such locations as may be necessary for the board to approve the boundaries of the unit and determine that the field, pool or pools have been *reasonably developed* according to a spacing pattern approved by the board. No field unitization shall be approved by the Oil and Gas Board until each drilling unit of the field has been drilled; *however, the Oil and Gas Board is hereby authorized to waive the requirement that each and every drilling unit be drilled upon a finding of fact that it is not economically feasible for a specific drilling unit to be drilled.*[88]

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[85]MISS. CODE ANN. § 6132-101 (Supp. 1972).

[86]*Id.*

[87]Act of June 5, 1964, ch. 236, § 2 (f), [1964] Gen. Laws Miss. 247 (emphasis added).

[88]MISS. CODE ANN. § 6132-102 (Supp. 1972) (emphasis added).

The 1972 amendment not only established a new standard based on reasonable development, but also gave the board the authority to completely waive this requirement if it found the requirement to be "not economically feasible."[89] As a result, the board is now vested with considerable latitude and discretion as to when field-wide unitization may be ordered. For example, under the new law, unitization could be ordered immediately upon discovery if the board determined that the drilling of another well would not be economically feasible. Section 2 (f) may prove to be the most important provision in the 1972 amendment.

Prior to the 1964 act, acreage alone had been the most frequently employed allowable allocation basis.[90] Section 3 (c) of the 1964 act, consistent with Mississippi Supreme Court decisions,[91] altered this and required that the board allocate allowables on the basis of the "contributive value" of each tract. Thus the allowable for each tract would be

> that proportionate part of unit production that the contributing value of such tract for oil and gas purposes in the unit area and its contributing value to the unit bears to the total of all like values of all tracts in the unit, taking into account all pertinent engineering, geological and operating factors that are reasonably susceptible of determination.[92]

This formula is obviously more equitable, and it was maintained in the 1972 act.

Section 3 (e) of the 1964 act was also amended in 1972. This section deals with the problem of forcing the unit members to bear their proportionate share[93] of the cost of the unitized operation. The 1964 act made each owner liable for his share and gave the unit operator the right to appropriate and sell the non-contributing owner's interest in the unit production with interest of 5 percent per annum, with any surplus to be credited to the defaulting owner. No procedure was pre-

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[89]*Id.*

[90]6 Williams & Myers, *supra* note 15, § 970.1, at 814. The 1948 Compulsory Pooling Act is a good example of this. MISS. CODE ANN. § 6132-21 (d) (1952).

[91]*See* Corley v. Mississippi State Oil & Gas Bd., 234 Miss. 199, 105 So. 2d 633 (1958), wherein the court stated that:

> The formula of participation based on surface acres has the merit of simplicity and certainty, but is entirely fair only in the rare cases where formations are uniform in quality and thickness throughout the unit with each tract having beneath it the same amount of reserves per acre.

*Id.* at 214, 105 So. 2d at 639.

[92]Act of June 5, 1964, ch. 236, § 3, [1964] Gen. Laws Miss. 247.

[93]Each tract shares in the costs in the same proportion that it shares in the unit production. MISS. CODE ANN. § 6132-103 (e) (Supp. 1972).

scribed for this. The 1972 amendment specifically gives the unit operator a lien on a non-contributing owner's interest and allows him to foreclose this lien in chancery court.[94]

Section 6 of the 1964 act, governing the allocation of production, also aroused some criticism. This section required that:

> The portion of unit production allocated to a separately owned tract within the unit area shall be deemed, for all purposes, to have been actually produced from such tract, and operations with respect to any tract within the unit area shall be deemed for all purposes to be the conduct of operations for the production of oil or gas, or both, from each separately owned tract in the unit area. Provided, however, when an oil, gas and mineral lease contains lands partially within and partially without said unit area, the unit agreement shall have no force and effect on lands lying outside of such unit area and failure of the lessee or lessees thereof to drill and develop such lands lying outside said unit area within ninety (90) days from the date of the determination of the unit area by the State Oil and Gas Board shall render such lease or leases on lands lying outside said unit area void and of no force and effect.[95]

The first sentence of the section makes operation on any tract within the unitized area legally equivalent to operations on each separately owned tract. The second, and most controversial[96] sentence, however, limited the legal effects of the unitized operations to that portion of the tracts included in the unit area established by the board. The lessee's duty to drill and develop lands outside the unit area was not affected by unit operations. Furthermore, the lessee was only given 90 days to drill and develop the excluded land or risk termination of the lease on the undeveloped portion.

Section 4 of the 1972 act substantially incorporates the first sentence of section 6 of the 1964 act, but changes the second sentence to read:

> Provided, however, when an oil, gas and mineral lease contains land partially within and partially without said unit area, the unit agreement and production from the unit shall have no force and effect on lands lying outside of such unit area and failure of the lessee or lessees thereof to drill and develop such lands lying outside said unit area *within one* (1) *year or during the term of the lease, whichever is a longer period of time,* from the date of determination of the unit area by the State Oil and Gas Board shall render such lease or leases . . . void and of no

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[94]*Id.*

[95]Act of June 5, 1964, ch. 236, § 6, [1964] Gen. Laws Miss. 247.

[96]*See* Custy & Knowlton, *supra* note 16, at 130-31.

> force and effect, unless otherwise held by production other than from unit production.[97]

The 1972 act continues the divisibility policy, but allows the lessee at least a year to drill and develop, and possibly longer depending on the term of the lease.[98] This should provide some relief to those lessees with leased tracts which are only partially inside a board-created unit.

A "Pugh clause" is often included in a lease agreement to accomplish divisibility.[99] The Pugh clause usually provides that if a portion, but not all, of a leased tract is included within a pool or a unit, production from the unit does not excuse payment of rentals on the part of the excluded leasehold.[100] An early Mississippi case, *Texas Gulf Producing Co. v. Griffith,*[101] held that where 8 acres of a 48-acre leased tract of land were not included in the unit, and where the lease did not otherwise provide for attributing the production of the unit operations to the excluded acreage, the production from the unit could not be used to extend the primary term on the acreage outside of the the unit area, even though it would do so for the acreage inside the unit. The court stated:

> [I]f a lease covered segregated tracts aggregating 1,000 acres and 40 acres thereof were placed in a drilling unit, and production should be had on land within the unit but not on the 40 acres, the lease might be continued in force indefinitely beyond the primary term as to the entire 1,000 acres, without any royalties, rentals, or other benefits to the lessor, or royalty and mineral owners, as to the 960 acres without the unit. To give this effect to the establishment of the unit under the facts of this case would, in our opinion, be a violation of the constitutional guaranty that no person shall be deprived of his property without due process of law.[102]

While a later Mississippi case[103] has been interpreted as reaching a different result in regard to divisibility, it is clear that the legislature adopted the *Griffith* approach.

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[97]MISS. CODE ANN. § 6132-106 (Supp. 1972) (emphasis added).

[98]*Id.*

[99]6 WILLIAMS & MEYERS, *supra* note 15, § 952, at 702-03.

[100]*Id.* § 952, at 703.

[101]218 Miss. 109, 65 So. 2d 447 (1953).

[102]*Id.* at 139-40, 65 So. 2d at 452.

[103]Wells v. Continental Oil Co., 244 Miss. 509, 142 So. 2d 215 (1962). In this case the unit was formed under the terms of a lease agreement, and although the court permitted production from the unit to be attributed to the excluded acreage, the court did indicate that the lease had an implied covenant to develop the excluded acreage and to prevent drainage.

It has been argued that this section of the 1964 act could be unconstitutional in certain situations.[104] However, at least one knowledgeable authority disagrees and argues that the statute strikes a good balance to govern most cases.[105] The primary concern seems to be that "failure of the lessee or lessees thereof to drill and develop such lands lying outside said unit area within ninety (90) days from the date of the determination of the unit area by the State Oil and Gas Board *shall render such lease* or leases on lands lying outside said unit area *void and of no force and effect*."[106] If the effect of this provision was to terminate the lease after 90 days even though the lease agreement specifically provided for a continuation, then the due process clause and the contract clause of the Constitution may prohibit such interference. In any event, that question of constitutionality would appear now to be moot because the 1972 amendment allows the lease on undeveloped land outside the unit to continue for either 1 year or the term of the lease, whichever is longer.[107] Thus, for those cases in which the lease specifies the effect of unitization of some but not all of the unified tract, the lease provisions could control. When the lease does not specify, the lessee would have at least 1 year to drill and develop, perhaps by forming another unit. The effect of this is to give the lessee everything he bargained for, and, in fact, may be discriminatory against the lessor or royalty owners by granting the lessee the year's period of grace.

Obviously this section represents a legislative compromise between the respective interests in the excluded lands. While this section of the 1964 act was criticized as being unduly favorable to the lessor,[108] the 1972 amendment would appear to be perhaps unduly favorable to the lessee.

Another problem in the 1964 act was the scope of the judicial review procedure. Prior to the 1948 act, appeals from final orders tried de novo in circuit court.[109] However, the Mississippi Supreme Court in *California Co. v. State Oil & Gas Board*[110] held that this delegation by the legislature of its legislative powers to the judiciary branch was unconstitutional in view of the separation of powers provisions of the Mississippi constitution.[111] As a result of the *California Co.* decision, the court's review of board orders has been limited to the question of

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[104]*See* 6 WILLIAMS & MEYERS, *supra* note 15, § 95, at 708.5—.12.

[105]*Id.* at 708.11.

[106]Act of June 5, 1964, ch. 236, § 6, [1964] Gen. Laws Miss. 247 (emphasis added).

[107]MISS. CODE ANN. § 6132-106 (Supp. 1972).

[108]*See* Custy & Knowlton, *supra* note 16, at 139.

[109]Act of May 18, 1932, ch. 117, § 5, [1932] Gen. Laws Miss. 315.

[110]200 Miss. 824, 27 So. 2d 542 (1946).

[111]MISS. CONST. art. I, §§ 1, 2; *Id.* art. IV, § 33; *Id.* art. VI, §§ 144, 156.

whether the orders are supported by substantial evidence, arbitrary or capricious, beyond the powers of the board, or violative of some constitutional right.[112]

In light of the *California Co.* case, section 12 of the 1948 act provided for appeals to the circuit court on the basis of the record proceedings before the State Oil and Gas Board.[113] However, to complicate matters, section 10 of the 1964 act provided that on appeal to the chancery court, the matter will be tried anew.[114] One's initial reaction to section 10 is that it would probably be held unconstitutional.[115]

The 1972 act, possibly in an effort to forestall litigation of section 10, provides that:

> Any interested person[116] adversely affected by any provision of this act or by any rule, regulation or order made by the State Oil and Gas Board hereunder, or by any act done or threatened thereunder, may obtain court review and seek relief by appeal, which appeal shall be to the chancery court of the county wherein the land involved, or any part thereof, is situated.
>
> . . . .
>
> Except as hereinabove provided, such appeal shall be made in accordance with the provisions of Chapter 185, Section 2(a), (b), (c) and (d) of the Laws of 1958, being Sections 6132-24 and 6132-25, Mississippi Code of 1942, as amended.[117]

As a result of this change, appeals will now be to chancery court on the record, and will be reviewed by the standards indicated above.

It can be argued that the appellate court (*i.e.*, the chancery court) should be required to consider more than the record of the proceedings before the State Oil and Gas Board. In certain instances, a new trial may be the only way to avoid injustice. For example, the statute contains provisions for notice before a hearing.[118] According to the rules of the State Oil and Gas Board:

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[112]*See* Board of Supervisors v. McCormick, 207 Miss. 216, 42 So. 2d 177 (1949); Dixie Greyhound Lines, Inc. v. Mississippi Pub. Service Comm., 190 Miss. 704, 200 So. 579 (1941); WATTERS, JUDICIAL REVIEW OF THE MISSISSIPPI STATE OIL AND GAS BOARD 324 (1965).

[113]MISS. CODE ANN. § 6132-24 (1952).

[114]Act of June 5, 1964, ch. 236, § 10, [1964] Gen. Laws Miss. 247.

[115]Custy & Knowlton, *supra* note 16, at 131.

[116]"The term 'interested person' as used herein shall be interpreted broadly and liberally and shall include all mineral and royalty owners." MISS. CODE ANN. § 6132-110 (Supp. 1972).

[117]*Id.*

[118]MISS. CODE ANN. §§ 6132-101, -108 (Supp. 1972).

> Notice of all hearings of the Board shall be given by publishing notice thereof at least ten (10) days before the date of hearing in a newspaper published daily in Jackson, Mississippi, of general circulation in the state, and in a newspaper of general circulation in the county or counties in which the pools involved are located; provided that notice of a hearing on a statewide rule or order affecting all pools in the state shall be published twice in a newspaper published daily in Jackson, Mississippi, of general circulation in the state, the first publication appearing at least ten (10) days before the date of hearing, and the second publication appearing at least five (5) days before the hearing, and no other publication shall be necessary for such hearing.
>
> The Secretary of the Board shall maintain a general mailing list and shall place thereon the names and addresses of all persons, firms, or corporations who make request in writing to be included on such list. Each person, firm and corporation on such mailing list shall be mailed at the address listed a copy of all notices and orders issued by the Board. The Secretary of the Board shall maintain a mailing list for each field in the state and shall place on each such list the names and addresses of all persons, firms or corporations who make request in writing to be included thereon. Each person included on the mailing list of any field shall be mailed at the address listed a copy of all notices and orders issued by the Board as to such field. *The failure to mail a copy of a notice to any such person, firm or corporation shall not affect the validity of any hearing held pursuant to the notice* published in accordance with the preceding paragraph or any rule, regulation or order issued pursuant to such hearing.[119]

Rule 5, from which the above excerpt was taken, authorizes the secretary of the board to mail notices to persons who have requested notice in writing. The rule further states, however, that failure to mail such notice shall not affect the validity of any hearing held pursuant to the published notice. Therefore, the rule, in effect, seems to require all holders of mineral interests to subscribe to the Jackson, Mississippi newspapers. It would seem that a better rule would be to require unitization petitioners to give notice to each holder of a mineral interest, and require an affidavit to that effect at the time of the filing of the petition.

In the only case reported to date, *Ohio Oil Co. v. Porter*,[120] the lower circuit court held the notice provision section unconstitutional under the Mississippi constitution as well as under the 14th amendment to the United States Constitution. However, the Mississippi Supreme

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[119]State Oil and Gas Bd., Order No. 201-51, Rule 5 (1970) (emphasis added).
[120]225 Miss. 55, 82 So. 2d 636 (1955).

Court refused to consider the unconstitutionality of the section because the appellant had actually appeared at the hearing.

If the notice provision is held to be unconstitutional, and if the appeal from the board's decision is based solely on the record, nonresident owners or other persons who did not receive notice of the original hearing might be deprived of property without due process. This could be avoided by permitting such persons to appear at the appeal and present such evidence as they would have presented had they received notice of the original hearing. Alternatively, the notice provision could be held unconstitutional as to those excluded owners, and a new hearing be ordered.

The latter result may be more equitable in that an appeal must be filed within 30 days of the final order.[121] If a nonresident failed to receive the original notice, it is unlikely that he would receive notice in time for an appeal.

As a practical matter, most of the mineral interest owners should receive notice because of the 85 percent consent requirement since the order will not become effective until it is ratified by 85 percent of the owners or lessees of interest.[122] It is unlikely therefore that any interest holder would fail to receive notice of a proposed hearing. In isolated instances, however, a problem could arise, and the rules should be broad enough to prevent an injustice in those cases.

Although the preceeding discussion highlights the more significant changes in the 1964 act, a section-by-section general comparsion of the two acts might be helpful. The following table contains a summary of both acts.

TABLE 2

| 1964 Act (Supp. 1971) | Sections | 1972 Amendments (Supp. 1972) |
|---|---|---|
| | 6132-101 "Unitization of oil and gas fields — applications." | |
| Required consent of 85 percent of owners or lessees and royalty owners (excluding royalty interests of lessees) prior to the submission of the petition to the board. Notice then given and hearing held by board to determine the need for unitization. | | Eliminates the pre-submission consent requirement. Also added authority for board to reopen hearings before orders become final under § 6132-104 (Supp. 1971). |

[121]State Oil and Gas Bd., Order No. 201-51, Rule 4 (1970).

[122]MISS CODE ANN. § 6132-101 (Supp. 1972).

| 1964 Act (Supp. 1971) | Sections | 1972 Amendments (Supp. 1972) |
|---|---|---|
| | 6132-102 | |
| | "Oil and gas board may order unit operation." | |
| Set forth conditions which board must find prior to ordering unitization. Required the board to find that unitized operations are: (a) "reasonably necessary"; (b) "feasible"; (c) "fair and reasonable" under the plan of unitization; (d) protective of the correlative rights; (e) economically feasible. Also required a finding of "fully drilled out" condition, *i.e.,* one well drilled every 40 acres (for an oil field) or every 320 acres (for a gas field). | | Maintained requirements (a) through (e), but changed (f). Requires operator to have completed a sufficient amount of drilling to establish boundaries to the field. Also allowed the board to waive the required one well per unit drilling if "not economically feasible." |
| | 6132-103 | |
| | "Provisions and requirements of Board's order." | |
| Required the board order to include geographical area, statement of operations, allocation formula, investment adjustment, expense allocation plus 5 percent interest charge for failure to pay, designation of unit operator, effective date, sale of gas and oil produced. Section (c) also contained requirement for drilling wells every 40 acres (320-gas) to determine field boundaries. | | Eliminates requirement of drilling on each unit and 5 percent interest charge. Lien and foreclosure rights added. |
| | 6132-104 | |
| | "When order becomes effective." | |
| Orders must be approved in writing by 85 percent of the owners or lessees and royalty interest holders within 12 months. | | No change. |

| 1964 Act (Supp. 1971) | Sections | 1972 Amendments (Supp. 1972) |
|---|---|---|
| | 6132-105 | |
| | "Amendment of orders — extension of units and inclusion of additional pools." | |
| Board given authority to increase unit on same conditions for forming unit except that the 85 percent requirement only applies to acreage being added, after order for the enlarged unit; cost adjustments to be governed by § 6132-103(d) (Supp. 1971). | | No change. |
| | 6132-106 | |
| | "How production allocated." | |
| Makes divisible-lease on excluded acreage void unless drilled within 90 days of order. | | Continues divisibility language but gives lessee 1 year and prorate delay rental option to continue lease on excluded acreage. |
| | 6132-107 | |
| | "Authority of unit operator — production by others prohibited." | |
| Makes production from wells in unit by other than unit operator unlawful. | | No change. |
| | 6132-108 | |
| | "Time and manner of giving notice." | |
| Requires 30-day notice before hearing plus 30-day pre-hearing mailed notice to all interest holders in unit area land, but failure to mail notice does not render board orders defective. | | No change. |
| | 6132-109 | |
| | "Administration of Act" | |
| Incorporates conservation policies as enumerated by § 6132-01 (1952). | | No change. |

| 1964 Act (Supp. 1971) | Sections | 1972 Amendments (Supp. 1972) |
|---|---|---|
| | 6132-110 | |
| | "Court review of order of oil & gas board by appeal to the Chancery Court." | |
| Permitted trial de novo in chancery court. | | Changed to appeal on the record to chancery court. |

Section 6 of the 1972 act made the act severable and repealed all prior and inconsistent laws. Section 7 made the act effective as of the date of its passage, April 24, 1972.

## Conclusion

While the practical effects of the 1972 act will be ascertainable only after some years of actual experience with it, it would appear that compulsory unitization under it may be a more feasible alternative. The necessity for a functional method of integrating interests on a field-wide basis cannot be overemphasized. Technological advances have clearly demonstrated the importance of secondary recovery operations in oil and gas resource development. Yet technological knowledge is useless if there are no workable methods by which implementation can be effected. Hopefully, the 1972 amendments to the compulsory unitization law will alleviate some of the problems of the 1964 act and thereby offer conservation interests a feasible solution to the problem of developing oil or gas resources in the most equitable manner. Perhaps experience will show that it was the level of voluntary agreement (85 percent), and not the time of consent that made compulsory unitization under the 1964 act almost unworkable. If this does prove to be the case, the legislature should lower the percentage to a more realistic level. It is not economically sound to allow 16 percent of the mineral interest owners to thwart the advantages of unitized development.

# OBSERVATIONS ON UCC ARTICLE 9: MISSISSIPPI'S FIRST FIVE YEARS

*A. Spencer Gilbert, III**

## I. Introduction

The Uniform Commercial Code has been in effect in Mississippi since March 31, 1968.[1] The most material change brought about by the adoption of the Code was in the Article 9 scheme for secured transactions. The new formalities of executing and filing financing statements in several different offices and the new vocabulary of Article 9 were quickly mastered by the affected businessmen and lawyers. This initial impact is over and the new formalities have become routine. A deeper effect of the Uniform Commercial Code has been felt in the small but expanding body of case law which has attempted to interpret the significance of the Article 9 executing and filing requirements. Interacting with the new case law is the practical experience businessmen and lawyers have attained in working with the Code. This experience has revealed shortcomings and problem areas in the statute. Another factor in the continuing development of the Code is legislative action — an especially important factor because the UCC is a statutory codification of virtually all substantive law dealing with transactions in personal property.

The UCC is intended "to simplify, clarify and modernize the law governing commercial transactions."[2] If this legislative purpose is to be carried out, the cases and legislative amendments must be regularly reviewed and evaluated. This article is an attempt to identify present and potential problem areas in Article 9 from a practical point of view. Some problems were built into the original Code by its draftsmen and some are unique to Mississippi because of our court interpretations or legislative action.

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[1]Miss. Code Ann. §§ 41A:1-101 *et seq.* (Special Supp. 1967) (hereinafter cited as UCC and followed by appropriate section numbers). Where Comments are cited, they are the official Comments to the 1962 Official Draft of the Code.

For general commentary on the Code *see* Stengel & Lacy, *The Uniform Commercial Code: A Preview,* 37 Miss. L.J. 55 (1965); Witherspoon, *Prognosis of the Uniform Commercial Code,* 34 Miss. L.J. 293 (1963).

[2]UCC § 1-102(a).

It is particularly appropriate now to review how Article 9 has fared in Mississippi practice, in the courts and legislature because of the publication of the Final Report of the UCC Permanent Editorial Board's Article 9 Review Committee.[3] After thorough study of the nonuniform amendments by various states as well as 17 years of court decisions and critical analysis in the law reviews, the review committee drafted and the UCC sponsors approved a substantive revision of Article 9.[4] The National Conference of Commissioners on Uniform Laws is urging the adoption of the 1971 Revised Article 9 by all Code states.

## II. General Provisions of Article 9

### *A. Conflict of Laws*

There was more than a little prophecy in Professor Stengel's comment that:

> Obviously, there will not be many conflicts of laws questions under the Code because the law will usually be the same in all of the states which have contacts with any commercial transaction. However, in view of the fact that many of the states which have adopted the Code have retained their automobile certificate of title laws, a great many controversies will continue to arise in this field.[5]

The first UCC case decided by the Mississippi Supreme Court, *Van Huss v. University Handbag Co.*,[6] involved just such a conflicts problem, though neither the lawyers nor the court perceived it.[7] In *Van Huss,* several trucks were purchased in Texas and brought into Mississippi subject to Texas certificates of title. In Mississippi the trucks were attached and then sold pursuant to a chancery court decree to satisfy a judgment previously entered against the purchaser. The Texas seller then sued the attaching creditor to establish a right to the proceeds of the judicial sale on the theory of the old vendor's lien.[8] The chan-

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[3]Permanent Editorial Board of the Uniform Commercial Code, Review Committee for Article 9, Final Report (1971).

[4]A complete explanation and analysis of the Revised Article 9 by a member of the Permanent Review Committee is contained in Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code,* 26 Bus. Law. 1465 (1971), and 27 Bus. Law. 321 (1971). *See also* Coogan, *The New UCC Article 9,* 86 Harv. L. Rev. 477 (1973).

[5]Stengel & Lacy, *supra* note 1, at 83.

[6]241 So. 2d 344 (Miss. 1970).

[7]Neither party's brief in the supreme court cited any substantive Code section, and the case was submitted without oral argument. It is significant that the court resorted to the Code on its own and reached the correct result, even though for the wrong reasons and relying on the wrong substantive law.

[8]Miss. Code Ann. § 337 (1956) (repealed March 31, 1968 by USS § 10-102 (h)).

cellor held for the attaching creditor, and the supreme court affirmed in an opinion containing only the barest facts, the principal paragraph of which reads:

> The record discloses that the appellant, who had asserted a purchase money lien, had wholly failed to perfect his security and interest [*sic*] therein by recording [*sic*] his lien inaccordance with the requirements as outlined in Section 9-301. It follows, therefore, under the provisions of this statute that his lien was secondary to those of appellee who had acquired a judgment lien against the property which made him the senior lien creditor and he therefore had first priority to the proceeds from the sale of the property.[9]

From the terminology[10] of the opinion it is apparent that the court was travelling in unfamiliar territory. An examination of the record and the briefs before the supreme court makes it clear that the issues were not properly presented nor was the Code properly applied, although the correct result was reached. An analysis[11] of this case provides a good example of the intricate interrelation of the various sections of Article 9 as well as the discipline required of lawyers and judges if the Code is to develop soundly through litigation and commercial practice.

If the seller's security interest has been perfected, he will always prevail over the subsequent "lien creditor."[12] The key issue therefore, is whether the seller's security interest was perfected. The first step in this case, or in any case involving a multistate transaction, is to determine what state's law is to govern the rights of the parties. Section 9-103 contains the choice of law rules for secured transactions:

> (4) Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this State or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.[13]

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[9]241 So. 2d at 345.

[10]Under the Code the secured party's interest is called a "security interest" (UCC § 9-101, Comment) and the basic procedure for perfecting the security interest is by filing (UCC § 9-302) and not by recording.

[11]This analysis assumes that there was a written security agreement between the buyer and the Texas seller and that the issue between the parties is whether the Texas security interest is perfected. The record is not clear on this point. The "validity" of the security interest, as opposed to the "perfection" of the security interest, would presumably be governed by the law of Texas, including its conflict of laws rules. UCC § 9-103 (3).

[12]UCC § 9-301.

[13]UCC § 9-103 (4).

Since the trucks in question were covered by Texas certificates of title, the law of Texas governed the perfection of the seller's security interest.

The Texas UCC is identical in all relevant particulars to that of Mississippi. The method of perfection is determined by section 9-302, subparagraphs (3) and (4):

> (3) The filing provisions of this Article do not apply to a security interest in property subject to a statute
>
> (a) of the United States which provides for a national registration or filing of all security interests in such property; or
>
> (b) of this State which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.
>
> (4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

The Code has thus sent the Mississippi Supreme Court to the Texas motor vehicle title statute[14] to determine the right to the collateral.

In fact, the seller was not listed as a lien-holder on the title certificates as required in Texas, and his security interest was not perfected. Therefore, the court reached the correct result by applying Mississippi law and looking to Mississippi records only. But, in a system based on precedent and stare decisis — even where there is a comprehensive statutory code — the reasons given for a decision are as important to the future development of the law as the result is to parties in the immediate action.[15]

### *B. Real Estate Leases*

In Part One of Article 9 the drafters tried to define its scope and applicability. One of the types of transactions expressly excluded from Article 9 by section 9-104 (j) is "the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder. . . ." However, section 9-102 (3) provides:

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[14]Texas Certificate of Title Act, TEX. PENAL CODE art. 1436-1 (Supp. 1972).

[15]The Mississippi Supreme Court has already demonstrated its ability to recognize late-found UCC wisdom when it reversed its own opinion on an issue involving Article 4 in Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, 253 So. 2d 828 (Miss. 1971), which reversed Holmes County Bank & Trust Co. v. Grenada Bank & Trust Co., 231 So. 2d 505 (Miss. 1970). Especially notice Judge Brady's concurring opinion in *Mississippi Bank & Trust* justifiably chastizing the lawyers for not giving much help to the court in deciding cases in this new area of law. 253 So. 2d at 834.

> (3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

The apparent contradiction between these subsections of Article 9 has left the practicing lawyer with a substantial dilemma in determining the interpretation of these two provisions as applied to security interests in real estate, especially in leases and deeds of trust.

A common situation where this problem arises is in the sale of business assets where the seller has a long-term lease on the realty and the purchase price is to be secured by a first lien on all the transferred assets including the lease. The business would have no value as a going concern without the leasehold interest, therefore, it is particularly important that the secured party have a good first lien on the leasehold interest. The secured party's lawyer is then faced with the apparent exclusionary language of section 9-104 (j) and the apparent inclusionary language of section 9-102 (3). It is important, however, to note that section 9-104 (j) is limited to the "creation" and "transfer of an interest in or lien on" real estate. Does this wording mean that only the initial lease or deed of trust creating and transferring the interest is excluded? If so, it would be reasonable to interpret section 9-102 (3) as bringing any subsequent creation of a security interest in a lease or deed of trust within the scope of Article 9. On this subject Gilmore says:

> [I]t is obvious that no statutory solution is provided: as the questions arise, the courts will have to provide a meaning for the intriguing verbal formula of a personal property security interest in a real property mortgage or lease.[16]

Until the courts determine the meaning of this statutory language, secured parties are going to continue to demand ironclad assurance on real property leases. In the past, very few lawyers have ever doubted the sufficiency of the long-established practice in such cases of using a deed of trust recorded in the land records. But section 9-102 (3) has now become a serious complicating factor when deciding how to perfect and how to foreclose. It would seem to be advisable for the prudent lawyer to hedge his bets — particularly where credit is extended partially in reliance on his written opinion of the validity of the first lien — and to record the deed of trust in the land records and to file notice thereof in the UCC records. Foreclosure could then be simultaneously carried out pursuant to the deed of trust and to the requirements of Article 9.

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[16]G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10-6, at 312 (1965).

### C. Subrogation Rights of Sureties

One recurring question under the Code is the applicability of Article 9 to the subrogation rights of a surety on a performance bond. The Mississippi Supreme Court was faced with this question in *The Travelers Indemnity Co. v. Clark*.[17] Travelers, the surety on a public works contract bond, completed the project after default of the contractor, and claimed against the contractor's receiver certain proceeds of the contract under the written assignment contained in the bond application. The court held that the surety's claim to the contract funds was based on the general equitable right of subrogation and that Article 9 did not apply to require filing of financing statements. The written assignment in the bond is merely "in aid of an equitable right; it does not create that right."[18]

In the *Travelers* case the assignment in the bond application covered, in addition to rights arising under the particular contract, rights arising and money due under other contracts of the principal. The court held in effect that this part of the assignment was an assignment of contract rights under Article 9 which required filing to be perfected against third parties.

## III. Form of the Financing Statement

Except for motor vehicles, consumer goods, and certain documents and accounts, a security interest must be perfected by filing.[19] A financing statement must be filed with the proper filing officer or officers[20] so that potential creditors of the debtor are put on notice that a certain secured party "may have a security interest in collateral described."[21]

There are two problems presented by the financing statement requirements of the Code. The first problem is in ascertaining the proper office or offices in which financing statements should be filed. Section 9-401 sets out the place or places of filing depending on the type of collateral.[22] These requirements create a trap for the wary and the unwary alike, but, unfortunately, we will have to live with this unnecessary uncertainty until a central filing system is adopted.[23]

The second problem is the form of the financing statement. Section

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[17]254 So. 2d 741 (Miss. 1971).

[18]*Id.* at 745.

[19]UCC § 9-302.

[20]UCC § 9-401.

[21]UCC § 9-402, Comment 2.

[22]UCC § 9-401.

[23]Robertson, *Application of Data Processing Techniques to the Uniform Commercial Code Filing System: A Modern Proposal for Mississippi*, 39 Miss. L.J. 173 (1968).

9-402 sets out the deceptively simple requirements of a financing statement: it must contain the addresses of the debtor and the secured party, be signed by the debtor and the secured party, and contain a description of the collateral by item or type. If a financing statement contains all of the foregoing elements, it is "sufficient" under section 9-402. The sufficiency of financing statements, however, has been one of the most fertile topics for litigation under the Code. Since filing is relevant only to the perfection and not the creation of a security interest, it is not surprising that most of the financing statement cases have occurred in the bankruptcy courts where the strong arm of the trustee is the acid test for perfection.[24] The cases that have arisen so far in Mississippi have been in the context of bankruptcy.[25] The only officially reported Mississippi financing statement case is *In re King-Porter Co.*,[26] in which the Fifth Circuit affirmed the principle of liberal construction of the Code to effectuate the underlying purposes of the notice filing system.[27]

In *King-Porter* the bankrupt signed a security agreement granting the secured party a security interest in all of the debtor's inventory, including after-acquired inventory, to secure the payment of all of the debtor's indebtedness to the secured party, including any future advances. Contemporaneous with the execution of the security agreement, the parties executed financing statements which were filed with the proper filing officers. The financing statements contained the names, addresses and signatures of the debtor and the secured party, along with a description of the collateral. In addition, in block number 5 on the face of the standard financing statement labeled "Name (s) and Address (es) of Assignee (s) of Secured Party," the secured party had typed the name and address of a bank. Shortly after the execution of the security agreement and financing statements, the secured party sold certain items of inventory to King-Porter in exchange for a note and trust receipt which was then assigned by the secured party to the bank whose name was typed in block 5 of the financing statement. Several

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[24]Bankruptcy Act § 70 (c), 11 U.S.C. § 110 (c) (1970).

[25]Because of the paucity of reported decisions in Mississippi construing the Code, it would be a service to the bench and bar for some organization interested in commercial law to publish selected opinions or abstracts of opinions of the referees in bankruptcy sitting in the state. It would promote uniformity in the construction of the Code — a basic purpose espoused in § 1-102 — and would enrich the state's decisional law on which the state courts and the federal courts could draw in future cases.

[26]446 F.2d 722 (5th Cir. 1971).

[27]The notice filing system of Article 9 is explained and its purposes set out in the official comments to §§ 9-101, 9-401, and 9-402.

months later King-Porter became indebted to the secured party on account of a sale of inventory to King-Porter, but the secured party did not assign its interest in this collateral to the bank nor did it ever assign the original security agreement to the bank.

When the debtor went into voluntary bankruptcy its trustee claimed and the referee held that the financing statement was insufficient to perfect the secured party's security interest in the inventory sold by or assigned to secured party and not reassigned to the bank.[28] The court of appeals reversed, holding the financing statement to be sufficient because it "disclosed sufficient information to enable any concerned creditor to contact the bank or claimant."[29] The financing statement is sufficient if an acquiring creditor can glean from it enough information on which to base further inquiry as to the true state of affairs. Thus, the Fifth Circuit has adopted a very liberal interpretation of the Code's filing requirements designed "to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves."[30]

The court's holding in *King-Porter*,[31] which places a heavy burden

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[28]The district court in an unreported opinion affirmed the referee's decision on other grounds without reaching the issue of the sufficiency of the financing statement.

[29]446 F.2d at 729, *citing* Silver v. Gulf City Body & Trailer Works, 432 F.2d 992 (5th Cir. 1970) and *In re* Colorado Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969). The court further stated:

> In this instance no creditor could have been misled by the inclusion in the financing statement that the bank was the secured party of record. Indeed, under the code's system of "notice" filing, the recorded statements indicate merely that the secured party of record *may* have a security interest in the collateral described. Further inquiry is necessary to disclose the complete state of affairs.

*Id.* (emphasis by the court).

[30]UCC § 9-402, Comment 5, *quoted in, In Re* King-Porter Co., 446 F.2d 722, 729 (5th Cir. 1971).

[31]The other issue decided by the Fifth Circuit in *King-Porter* was the validity of section 9-108, which purports to save after-acquired collateral obtained less than four months prior to bankruptcy from the stigma of antecedent debt and thereby prevent the transfer from being a voidable preference under section 60(a) of the Bankruptcy Act. The court upheld the validity of section 9-108. This issue of the validity of the "floating lien" in bankruptcy is not within the scope of this article. See the numerous law review articles cited in DuBay v. Williams, 417 F.2d 1277 n.2 (9th Cir. 1968), Poulos, *The Law Reviews: A Critical Analysis of the Decisions Upholding Floating Liens Against a § 60 Attack,* 46 AM. BANKR. L.J. 79 n.3 (1972). For comment on the *King-Porter* case in particular *see* WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 822-83 (1972); Kennedy, *Uniform Commercial Code Annual Survey of Legal Developments — Secured Transactions,* 27 BUS. LAW. 755, 769 (1972).

on an inquiring creditor, raises some important questions about the practices of the Secretary of State and the chancery clerks with regard to the manner and form in which they supply information to inquiring creditors. Generally a creditor may personally inspect the UCC records in the chancery clerks' offices. However, the Secretary of State does not allow inspections of the filings in his office. Inquiring creditors must use the UCC-11 form and receive the Secretary of State's certificate as to the financing statements on file in his office.[32]

The Code provides that by noting the name of an assignee on an original financing statement or by filing a statement of assignment, the assignee becomes the "secured party of record."[33] In responding to requests for information on forms UCC-11, most filing officers, including the Secretary of State, list the assignee only as the secured party where there is a notation of assignment or a separate notice of assignment. The *King-Porter* case holds, however, that the financing statement is merely a public notice of parties who "may have a security interest in the collateral"[34] of the particular debtor, and that the original secured party does not lose his perfection by notation of the name and address of an assignee or potential assignee on the face of the original financing statement. Therefore, it would appear that a filing officer in response to a UCC-11 request for information, would be required to note on his certificate the names and addresses of both the original secured party and the assignee. In fact, the UCC-11 forms approved by the Mississippi Secretary of State contain the following language: "please furnish certificate showing . . . the names and addresses of *each party* therein . . . ."[35] "Each party" would seem clearly to include both the secured party and any assignee that might appear on the same financing statement. These difficulties and potential pitfalls in the requests for information procedures emphasize the desirability of inspecting copies of the financing statements

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[32]Section 9-407 (2) states the duties of each filing officer with regard to request for information:

> Upon request in writing of any person, the filing officer shall issue to such requesting party his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment, amendment, continuation, partial release or termination thereof, and if there is, giving the date and hour of each such statement or assignment and the name and address of each secured party or assignee. . . .

[33]UCC § 9-405 (3).

[34]446 F.2d at 729.

[35]OFFICE OF THE SECRETARY OF STATE, MISSISSIPPI UNIFORM COMMERCIAL CODE: PROCEDURES AND FORMS FOR FILING IN THE OFFICE OF THE SECRETARY OF STATE 44 (2d ed. 1968) (emphasis added).

to enable the inquiring creditor to make a more intelligent decision in determining whom to ask about security interests in the collateral of the debtor. Copies are relatively expensive ($2.50 each in addition to the $2.00 search fee). But where the amount to be secured is large, and since the Secretary of State's bond is only $10,000, it would be highly desirable to request copies rather than information only.

There have been some unreported Mississippi bankruptcy cases that are of significance. In *In re Cranford,*[36] an automobile was financed by a bank prior to the effective date of the Motor Vehicle Title Act[37] and the debtor's name in the financing statement was spelled "Cra*w*ford" rather than "Cra*n*ford." Following the great weight of authority in other jurisdictions, the referee held that misspelling the debtor's name in the financing statement rendered the statement insufficient and the bank's security interest unperfected. This holding appears to impose a harsh result on a secured party who made a rather minor spelling error. This is the correct result, however, because misspelling the debtor's name is "seriously misleading"[38] where the financing statements are filed alphabetically according to the name of the debtor and one wrong letter in a name would make it impossible to identify him.[39]

Applying the Uniform Commercial Code to a transaction that occurred prior to the effective date of the Motor Vehicle Title Act, the district court for the southern district affirmed the referee's ruling that where there was a delay in filing the financing statement, the security interest in an automobile was not perfected until the date of filing.[40]

In a northern district case the referee denied reclamation by the assignees of a valid security interest because the negligence of an automobile dealer in following through on the application for a title certificate and not the negligence of the bankrupt resulted in the delay in issuance of the title certificate that was necessary for perfection.[41]

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[36]In Bankruptcy No. 7980 (S.D. Miss.).

[37]Miss. Code Ann. § 8125-21 (Supp. 1972).

[38]UCC § 9-402(5) states: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

[39]Although the probability of filing in the wrong place would be completely eliminated by a central computerized filing system, the probability of error should significantly decrease even without a computer if the debtor on each financing statement were identified by his social security or IRS employer identification number in addition to or instead of his name. Such numerical identification of debtors would also solve the problem of the proper identification of trade names and partnerships on financing statements.

[40]*In re* Hadad, Nos. 1888-89 (S.D. Miss., March 10, 1970).

[41]*In re* James, In Bankruptcy No. DBK 70-26 (N.D. Miss., Feb. 4, 1971).

The referee in the northern district has also refused to reform a certificate of title that inadvertently showed Chrysler Credit Corporation rather than CIT as first lienholder, even though the dealer made an honest mistake in filling out the title application and all parties to the transaction intended CIT to be the secured party.[42]

The problem of using pre-Code concepts in a UCC case is apparent in the district court's opinion in *In re Jackson Sound Studies, Inc.*[43] As a separate reason for affirming the referee's decision denying reclamation of certain inventory and equipment, the court ruled that the description of the collateral in the security agreement "was void and imparted no notice to anybody and could not be made specific or definite without violating the Parole Evidence Rule,"[44] citing the 1935 case of *National Foods, Inc. v. Friedrich*[45] as authority. This reasoning is contrary to the express provisions of Article 9. Section 9-110 provides that "[f]or the purposes of this Article any description of personal property. . .is sufficient whether or not it is specific if it reasonably identifies what is described." The comment to section 9-110[46] makes it clear that this section was intended to replace the tests for sufficiency of description developed under pre-Code law: "Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called 'serial number' test."[47]

## IV. Remedies on Default: Replevin v. Summons and Seizure

One of the most critical problems to the chattel financer is what action to take on default. How can the collateral be repossessed, and how can a deficiency judgment be obtained against the debtor?[48] The answers provided in the Code are not clear, and in practice there seems to be some confusion about the appropriate remedy for judicial repossession or foreclosure.

Section 9-503 provides that a secured party has on default the right to take possession of the property: "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or *may proceed by action.*" In Mississippi, replevin is the

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[42]*In re* Copeland, No. EBK 70-15 (N.D. Miss., May 7, 1970).

[43]In Bankruptcy No. 8770 (S.D. Miss., Aug. 22, 1972), *aff'd on other grounds*, No. 72-3238 (5th Cir., Feb. 8, 1973).

[44]*Id.*

[45]173 Miss. 717, 163 So. 126 (1935).

[46]UCC § 9-110, Comment.

[47]*Id.*

[48]Provisions about default procedures are contained in UCC §§ 9-501 to -507.

proper action for taking possession of personal property.[49] However, from an inspection of the docket of the County Court of Hinds County at Jackson it appears that many finance companies regularly use the action of summons and seizure[50] to judicially enforce and foreclose their security interests in personal property. The Code and the Mississippi cases teach that summons and seizure is not the proper remedy to repossess collateral under a security agreement.

Under pre-Code statutes the seller of personal property had a vendor's lien on the property while it remained in the hands of the original buyer or in a subsequent owner with knowledge that the purchase price was unpaid.[51] The lien was purely statutory and required no agreement between the buyer and the seller to create the right in the seller. Enforcement of the vendor's lien was by summons and seizure, a statutory remedy expressly created to enforce the vendor's lien.[52]

The statute provides that "A person having any lien in the foregoing sections mentioned [including §337] can enforce the same by. . ." the summons and seizure procedure.[53] Therefore, once the vendor's lien statute was repealed[54] and the Code security system enacted, the summons and seizure procedure would, by its terms, not apply. It is now merely

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407 U.S. 67 (1972). Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972). The summons and seizure statute has likewise been declared unconstitutional in Taylor v. Ross, No. 72-3626 (5th Cir., December 19, 1972). The following discussion of the replevin and summons and seizure statutes refers to unconstitutional statutes and the section numbers in the 1942 Code on the assumption that new replevin and seizure statutes adopted by the 1972 Legislature will not basically change the substance of the two actions but will change only the procedure relating to pre-seizure notice and hearing.

A federal district court in California has declared sections 9-503 and 9-504 void as violative of due process of law because these sections allow repossession of collateral by the secured party on default without allowing the debtor a pre-seizure notice and opportunity to be heard. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). More recently, a federal district court in Mississippi also declared section 9-503 void and unenforceable "insofar as it authorizes the summary seizure of personal property without affording adequate prior notice and an opportunity for a pre-seizure due process hearing to determine possessory rights to the property, absent a knowing and intelligent waiver of such rights." James v. Pinnix, No. 72-J-250(n) (S.D. Miss., Feb. 14, 1973) *Notice of appeal filed* March 16, 1973.

[49]Miss. Code Ann. §§ 2841-69 (1956). The Mississippi replevin statute has been declared violative of due process and unconstitutional because of the lack of notice and opportunity for hearing before seizure as required by Fuentes v. Shevin,

[50]Miss. Code Ann. §§ 341-51 (1956).

[51]*Id.* § 337.

[52]*Id.* § 341.

[53]*Id.*

[54]UCC § 10-102(h).

a statutory procedure for enforcement of liens—generally mechanics liens —created by statute.[55] All security interests or "liens" under the Code are created by agreement, not by statute, and to be enforceable this agreement must be in writing, contain a description of the collateral, and be signed by the debtor.[56] Statutory liens for services or materials are expressly excluded from Article 9.[57] Presumably, with the repeal of the statutory vendor's lien the remedy of summons and seizure would be relegated to the enforcement of the genuine statutory mechanics and materialmen's liens, and replevin would become the sole remedy or action by which a secured party under the Code would take possession of the collateral after default.[59] On default, "unless otherwise agreed," under section 9-503, the secured party has the right only to possession with the concomitant rights and duties to dispose of the collateral, to apply the proceeds of sale, and to get a deficiency judgment.[60] The Code itself contains no procedure or remedy by which possession may be taken; it merely says "by action."[61] Replevin is the only action in Mississippi to determine the right to possession of personal property.[62]

Summons and seizure is, nevertheless, an attractive and economical remedy for the purchase money secured party, especially where a deficiency judgment is desired, even though it may not be proper. The property can be seized after the affidavit is filed and there is no liability for wrongfully seizing the property. There is no provision for bond, although the defendant may replevy any goods wrongfully seized.[63] The most attractive feature of summons and seizure, however, is that in one action the property may be repossessed, sold and a judgment rendered against the defendant for the deficiency. In fact, the rights of all parties claiming an interest in the property can be adjudicated in a single summons and seizure action.[64]

Replevin, on the other hand, requires an affidavit to commence the action and to issue a writ of replevin for seizure of the property.[65] The

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[55]MISS. CODE ANN. § 353 (Supp. 1972).

[56]UCC § 9-203 (1) (b).

[57]UCC § 9-104 (c). Statutory mechanics liens take priority over perfected security interests unless the statute creating the right expressly provides otherwise. *Id.* § 9-310.

[58]MISS. CODE ANN. § 337 (1956).

[59]UCC § 9-503.

[60]UCC §§ 9-504 to -507.

[61]UCC § 9-503.

[62]Deposit Guar. Nat'l Bank v. Ellzey, 222 So. 2d 680 (Miss. 1969); Road Material and Equip. Co. v. McGowan, 229 Miss. 611, 91 So. 2d 554, 92 So. 2d 245 (1956).

[63]MISS. CODE ANN. § 349 (1956).

[64]*Id.* § 341. *See* Huntly v. Drummond, 226 Miss. 753, 85 So. 2d 188 (1956).

[65]MISS. CODE ANN. § 2841 (1956).

action is possessory only and must be brought by a person entitled to possession against the person who has possession of the property, regardless of whether the debtor is a party to the action or has possession of the property.[66] After the property has been taken into the possession of the sheriff, the plaintiff must file a declaration in replevin to which the defendant must answer to create an issue of the right to possession.

When a secured party is successful in taking possession by replevin, the next step is to proceed under section 9-504 to dispose of the collateral by public or private sale and to apply the proceeds to the debt after deducting expenses of sale.[67] In the typical case the proceeds from a sale of repossessed collateral do not equal the outstanding indebtedness and the secured party is entitled to a judgment for the deficiency.[68] A separate action on the underlying obligation must be brought to get a deficiency judgment.

It is clear from the above comparison that the foreclosure of the old vendor's lien by summons and seizure incorporated all three steps—repossession, sale, and deficiency judgment—into one judicial procedure.[69] The Code, on the other hand, requires three distinct steps: (1) replevin; (2) disposition of collateral pursuant to section 9-504 (3); and (3) action for deficiency judgment. It is understandable that summons and seizure, although inappropriate and demurrable where a Code security interest is being foreclosed, is attractive to the finance companies. It is less understandable, however, that after almost 5 years under the Mississippi UCC the practice is still common, thus avoiding the minimum safeguards for defaulting debtors provided by section 9-504 (3).

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[66]Road Material and Equip. Co. v. McGowan, 229 Miss. 611, 91 So. 2d 554, 92 So. 2d 245 (1956).

[67]If the value of the property is greater than the debt secured by it, there may be: (1) a judgment if the defendant has given bond that the property be returned, or, in the alternative, that plaintiff recover the amount of his limited interest in the property measured by the balance due with interest and damages. MISS. CODE ANN. § 2860 (1956); Road Material and Equip. Co. v. McGowan, 229 Miss. 611, 91 So. 2d 554, 92 So. 2d 245 (1956); or (2) if the defendant has not given bond, a judgment giving plaintiff possession of the property plus damages. MISS. CODE ANN. § 2862 (1956). Under pre-Code law, the debtor was protected by the duty, enforceable in chancery, of the secured party to deal with the property with regard to the equitable rights of the debtor. Ross-Meehan Brake-Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 18 So. 364 (1895). Under the Code (sections 9-504 to -507) the equitable standard of "commercial reasonableness" must govern the manner of disposition of the property.

[68]UCC § 9-504 (2).

[69]Central Motor Exch. of Miss., Inc. v. Thompson, 236 So. 2d 736 (Miss. 1970); Runnels v. Fairchild, 204 Miss. 287, 37 So. 2d 312 (1948).

## V. Mobile Homes: A Case Study

Another problem area under Article 9 is the manner in which security interests in mobile homes are perfected. As conventional residential building costs have risen, mobile homes have become more and more popular as permanent residences. Sales have increased and the financing of mobile homes has become an important part of the finance business. In response to this large investment in mobile homes, the legislature has responded with several measures aimed at clarifying the mobile home financer's position as a perfected secured party; but, unfortunately, the aim has been wide of the mark. The UCC and related statutes have not dealt satisfactorily with hybrid types of collateral.

Under the original Code as passed in Mississippi, a security interest in a mobile home or house trailer, generally classified as a "motor vehicle required to be licensed," was perfected by filing a financing statement.[70] However, on July 1, 1969, the Motor Vehicle Title Act became effective, requiring perfection of security interests in mobile homes smaller than 8 feet in width and 13½ feet in height by notation of the security interest on a title certificate.[71] After the enactment of the Motor Vehicle Title Act, it was commonly thought that security interests in the larger mobile homes—the ones most likely to be used as residences and not moved frequently from place to place—would be perfected by filing a financing statement, while the smaller, more mobile "house trailers"—less than 8 feet wide and 13½ feet tall—would be covered by motor vehicle titles and liens perfected by notation of the lien on the title certificate. The Code expressly exempts from its filing provisions security interests in motor vehicles where a statute requires indication of a security interest on the certificate of title.[72]

Mobile homes defy nice categorization in the terms used by the Code. The Motor Vehicle Title Act arbitrarily sets 8 feet wide and 13½ feet high as the cutoff point between mobile homes that are "motor vehicles" and those that are not. But it does not answer the question: "What is a mobile home that is no longer mobile?" For, once a "mobile home" is situated rather permanently on the owner's property, a diligent secured party will ask whether his collateral is personal property, a fixture, or real property. The answer to this riddle will determine how the secured party should perfect and foreclose his security interest. There is no clear statutory answer. The owner of the mobile home, on the other hand, is interested in whether the mobile home is personalty or realty for homestead exemption purposes.

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[70]UCC § 9-302 (1).

[71]Miss. Code Ann. § 8125-21 *et seq.* (Supp. 1972).

[72]UCC § 9-302 (3) (b).

In 1971 the legislature attempted to answer the questions of both the financers and the owners by amending section 10007-78 of the Mississippi Code to read as follows:

> The mobile homeowner who owns the land on which the mobile home is located shall have the option at the time of registration of declaring whether the mobile home shall be considered as personal or real property. However, this section shall not preclude a mobile homeowner from subsequently declaring such mobile home to be an improvement to real property where such mobile home qualifies as such. If it is to be considered real property, then the wheels must be removed and the county tax assessor shall enter it on the land rolls and tax it as an improvement on the land on which it is located from the date of registration. Provided, however, that notwithstanding any provision of this section or of any other statute or law of the state to the contrary, all mobile homes shall be deemed by law to be personal property and not real property for purposes of granting and obtaining a security interest therein, and the perfection of such a security interest shall be governed by the provisions of Article 9 of the Mississippi Uniform Commercial Code. Be it further provided that the perfection of a security interest in a mobile home which has been, or may be, declared an improvement to real property, shall not create a security interest in or lien on the land itself.[73]

Although the owners received a clear answer to their homestead problem, the financers apparently received only ambiguity. The Secretary of State interpreted the amendment as making it impossible to perfect a security interest in *any* mobile home by noting it on the title certificate.[74] There-

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[73]MISS. CODE ANN. § 10007-78 (Supp. 1972).

[74]Uniform Commercial Code Memorandum Number Nine, July 23, 1971, reads as follows:

> Prior to the date (July 1, 1969) on which the Motor Vehicle Act became operative in this State, security interests in mobile homes generally were perfected, judiciously or not, under the provisions of the Uniform Commercial Code. House trailers (mobile homes), with specified exclusions, came within the definition of "motor vehicle" as set out in the Motor Vehicle Title Act. House trailers specifically excluded were those exceeding eight feet in width and thirteen feet six inches in height. It thus appears that a security interest in those exclusions might continue to be perfected under the Uniform Commercial Code. In all other cases, the security interest would be perfected by having a record of the lien appear on the title to "vehicle" in the manner and form provided by the Motor Vehicle Title Act.
> [Act of Aug. 9, 1968, ch. 587, § 8, (1968) Gen. Laws Miss. 1018, 1020.] made it optional with the mobile home owner to declare the mobile home as an improvement on the land on which it was located, or as personal property for tax purposes. If the owner declared the mobile

fore, the Secretary of State's interpretation would require the filing of a financing statement to perfect security interests, even in smaller mobile homes. Section 10007-78 *does not* say that the "perfection of security interests in all mobile homes shall be by filing a financing statement." Rather, it says: "the perfection of such a security interest shall be *governed by the provisions of Article 9 of the Mississippi Uniform Commercial Code.*"[75] One of the "provisions" of Article 9 is that the filing provisions do not apply to property where a statute requires the lien to be noted on a certificate of title,[76] *e.g.*, the Motor Vehicle Title Act governing the smaller mobile homes.

Neither the Code, the Motor Vehicle Title Act, the mobile home assessment statute, nor the Secretary of State addresses or clearly answers the basic question of whether a smaller mobile home[77] purchased and financed with the express intention of permanently affixing it to realty, is a fixture under the Code and thereby subject to the special filing requirements of section 9-401(1) (b) and the special priority rules of section 9-313. The Code does not define "fixture"—another hybrid type of collateral—but leaves the definition to other laws of the state.[78]

The problems arising from the many facets of mobile homes are not easily solved, in part because the problems are relatively new and the concepts still fairly fluid. However, more careful draftsmanship in the future can prevent the micro-*renvoi* problem that has occurred by ambiguous incorporation of other statutes by the legislation concerning per-

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home as an improvement to his real property, the question of title would arise in the case of sale or a foreclosure of the real property on which the mobile home was situated. It thus appears the passage of title to the real property could possibly jeopardize the secured party's interest in the mobile home whether it was perfected under the provisions of either the Uniform Commercial Code or the Motor Vehicle Title Act in some cases. In order to avoid possible confusion and to make the creditor more comfortable as to his security interest in any mobile home which he might finance, the tax law aforementioned was amended during the 1971 Regular Session to provide, among other things, that "all mobile homes shall be deemed by law to be personal property and not real property for the purpose of granting and obtaining a security interest therein, and the perfection of such security interest shall be governed by the provisions of Article 9 of the Mississippi Uniform Commercial Code." This would appear to vitiate any security interest in any mobile home under the provisions of the Motor Vehicle Title Act attempted from and after the passage of the aforementioned amendment. [MISS. CODE ANN. § 10007-78 (Supp. 1972).]

[75]MISS. CODE ANN. § 10007-78 (Supp. 1972) (emphasis added).

[76]UCC § 9-302(3) (b).

[77]Less than 8 feet in width and 13½ feet in height.

[78]UCC § 9-313, Comment 2.

fection of security interests in mobile homes. It seems clear that the purpose of section 10007-78 was to allow homestead exemption for mobile homes in certain cases. The ambiguous language in the "provided" clauses was apparently added to make it clear that the election to treat a mobile home as realty for assessment purposes did not make the mobile home realty for purposes of perfection of security interests. A more logical approach would be to limit section 10007-78 to the assessment provisions and expressly state that assessment of a mobile home on the land rolls does not change the character of the property from personal to real. At the same time amendments to Article 9 and to the Motor Vehicle Title Act should be considered to clarify if and when a mobile home may become a fixture.

## VI. Conclusion

This overview of Article 9, although limited in scope, indicates the need for continuing critical review of the UCC. It would be naive to expect so comprehensive a statute to be self-maintaining given the problems inherent in draftsmanship, judicial interpretation, and interaction with other statutes. The ultimate responsibility for continuing review of the UCC must lie with the legislature. However, due to the legislature's limited staff, the bar must share that responsibility and take the initiative in this area, as it did when the Code was originally adopted. The legislature should receive annual reports from a standing committee of the state bar on the UCC, covering Code development not only in Mississippi but throughout the nation. This process should begin now with a serious study of the review committee's suggested revisions to Article 9.[79]

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[79]Permanent Editorial Board Of The Uniform Commercial Code, Review Committee For Article 9, Final Report (1971).

# HEART ATTACKS IN WORKMEN'S COMPENSATION— THE MISSISSIPPI EXPERIENCE

*Alben N. Hopkins**

## Introduction

The most troublesome problem in workmen's compensation law has been and continues to be the heart case. Mississippi heart case problems are not unlike those of practically every other jurisdiction which seeks their resolution.[1] A review of the Mississippi cases is reminiscent of Dorothy's stroll down the yellow brick road to see the Wonderful Wizard — with all of that trip's accompanying ills and woes.

In the first Mississippi heart case, *Fischer v. Gloster Lumber & Builders Supply Co.*,[2] the court, while denying compensation, commented that the question of compensability of heart cases under the Workmen's Compensation Act was an "interesting contention."[3] Since the *Fischer* decision, various subjective criteria, impossible to conform into a set of uniform standards, have been applied in determining the propriety of granting compensation.[4] Such variance between cases has left the courts perplexed in their attempts to determine the merits of compensability in each case. In *Leake County Cooperative (A.A.L.) v. Dependents of Barrett*,[5] the court stated that "just as the rainbow embodies in its spectrum all color, so have the Workmen's Compensation Commission and this Court utilized all legal strategies in determining the compensability or non-compensability of claims relating to heart maladies."[6] The problem has become so acute that at times even the court itself is left in utter disbelief. For example, in *Washington v. Greenville Manufacturing and Machine Works*,[7] one member of the Mississippi Supreme

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[1]Larson, *Workmen's Compensation: An Analysis and Suggested Solution*, 65 Mich. L. Rev. 441 (1967) [hereinafter cited as Larson, *Analysis and Suggested Solution*]. The author attempted by analytical judgment to arrive at a working solution. The Michigan and New York experiences were reviewed.

[2]257 So. 2d 871 (Miss. 1952).

[3]*Id.* at 872.

[4]Leake County Cooperative (A.A.L.) v. Dependents of Barrett, 226 So. 2d 608 (Miss. 1969).

[5]*Id.*

[6]*Id.* at 613.

[7]223 So. 2d 642 (Miss. 1969).

Court commented, while specially concurring, that: "The application of the workmen's compensation act in heart cases has been extended beyond the intention of the legislature and beyond the basic purposes of the workmen's compensation act."[8] Nevertheless, an analysis of the past may serve to relieve us of the burden of reliving previous mistakes and surface solutions yet untried.

## Historical Background

The workmen's compensation concept seeks to bring financial assistance to those who suffer industrial casualties. A variety of dates are given as marking the origination of the compensation movement.[9] Switzerland is sometimes credited with one of the earliest laws, enacted in 1877;[10] however, Germany is usually acclaimed as having originated the workmen's compensation movement with the adoption of the German Compensation Act of 1884.[11] This act was integrated into a comprehensive scheme of industrial insurance, parts of which, such as sick insurance, had previously become effective.[12] Thirteen years after Otto von Bismark led the passage of the German law, England followed suit because of the failure of the common law to adequately protect the mounting number of injuries and deaths resulting from industrial growth.[13] The concept spread across Europe, eventually reaching many nations of the world.[14] In 1910 as a result of a New York State Study Commission report, New York passed a compensation law[15] modeled after that of England and Germany. The concept was readily adopted throughout the United States and by 1920 all but six states had passed workmen's compensation statutes. In 1948 Mississippi became the last

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[8] *Id.* at 648.

[9] 1 A. Larson, Law of Workmen's Compensation §§ 1-5 (1964) [hereinafter cited as A. Larson]; W. Schneider, Workmen's Compensation §§ 1-10 (Perm. ed. 1941); 58 Am. Jur. *Workmen's Compensation* §§ 1-7 (1962); 99 C.J.S. *Workmen's Compensation* §§ 1-15 (1958).

[10] E. Blair, Defense Guide to Workmen's Compensation § 1:00 (1972).

[11] Lewis & Clark County v. Industrial Bd., 52 Mont. 6, 155 P. 268 (1916).

[12] W. Malone & M. Plant, Cases and Materials on Workmen's Compensation 54 (1963).

[13] Horovitz, *Worldwide Workmen's Compensation Trends,* 59 Ky. L.J. 37, 40-41 (1970-71).

[14] L. Frankel & M. Dauson, Workmen's Insurance in Europe (1910). *See also* Hoets, *European View of Heart Attack Compensation,* 11 Clev.-Mar. L. Rev. 221 (1962), for a discussion of the status of compensation heart cases in Germany, Netherlands and France.

[15] The Report of the National Commission on State Workmen's Compensation Laws 34 (July, 1972).

of the 48 adjoining states to adopt workmen's compensation legislation.[16] Alaska and Hawaii adopted similar legislation shortly after being granted statehood.[17]

The Mississippi Workman's Compensation Act was recognized almost from its inception as one of the best in the country.[18] The purpose of the Mississippi act was to relieve society of the onus of support to employees and their dependents resulting from the economic loss they suffered due to injury or death in industrial accidents.[19] Toward this end the law made the employer an insurer of all of his employees, regardless of negligence or fault, subject to narrow exclusions and reasonable limitations on the benefits.[20] The act did not include special reference to heart cases under the "accidental injury" definition[21] and it was, therefore, left to the court to decide whether or not heart cases would fall within this definition of coverage. Here began the questioning in heart cases that still plagues the courts today.

## Compensation Law Provision

The pertinent part of the basic coverage clause of the Mississippi Workmen's Compensation Act reads: " 'Injury' means accidental injury or accidental death arising out of and in the course of employment. . ."[22] For a death to be covered by the act, it must result only from an "injury" as defined in the basic coverage clause.[23] After it has been established that the employer's business is subject to the Compensation Act,[24] the three essential elements of the basic coverage clause must also be satisfied before recovery will be allowed.

The first essential is that the injury be accidental.[25] The Mississippi Supreme Court, quoting Larson's treatise, defined "accident" as follows:

> The "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine per-

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[16]Act of April 13, 1948, ch. 354, [1948] Gen. Laws Miss. 507.

[17]W. Prosser, Handbook of The Law of Torts 530 (4th ed. 1971).

[18]"The Mississippi workmen's compensation statute, with the one exception of its omission of occupational disease coverage, is one of the best statutes in the country." Larson, *Workmen's Compensation in Mississippi: The First Five Years,* 25 Miss. L.J. 109 (1954).

[19]Stanely v. McLendon, 220 Miss. 192, 70 So. 2d 323 (1954).

[20]Satterfield, *An Introduction to the Mississippi Workmen's Compensation Act,* 20 Miss. L.J. 27 (1948).

[21]Miss. Code Ann. § 6998-02 (2) (Supp. 1972).

[22]*Id.*

[23]*Id.* § 6998-02 (3).

[24]*Id.* § 6998-03.

[25]Malone, *The Mississippi Workmen's Compensation Act in Prospect,* 20 Miss. L.J. 137, 144 (1949).

> formance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia and the like, the injury is held accidental.[26]

Other heart cases have construed the accidental injury requirement in similar terminology requiring the occurrence to be neither expected, designed, nor intentionally caused by others.[27]

The second essential is proof that the "accidental injury" arose out of the employment. Although not without contradiction, it may be succinctly stated that "arising out of" refers to the origin or cause of an injury and is descriptive of its character, involving the idea of causal relationship between the employment and injury.[28] The term bears about the same relationship to workmen's compensation as the term "proximate cause" bears to the law of negligence.[29] In *Rushing v. Water Valley Coca Cola Bottling Co.*,[30] the meaning of "arising out of the employment" was defined as follows:

> While the interpretation of the phrase "arising out of the employment" as used in workmen's compensation acts to define the injuries compensable thereunder, has given rise to many questions of considerable difficulty, as to which the decisions are not harmonious, there is general agreement upon the proposition that an injury arises out of an employment when but only when there is a causal connection between such injury and the conditions under which the work is required to be performed; it is not sufficient that the employee is at the place of his employment at the time of the accident and doing his usual work.[31]

It should be remembered that the independent issue of causation may turn upon the nature of the work acting as a causative element from a physical or medical viewpoint.[32]

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[26]Pennington v. Dependents of Smith, 232 Miss. 775, 100 So. 2d 569, 570 (1958).

[27]Ingalls Shipbldg. Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645, 649 (1952); *See* Shivers v. Biloxi-Gulfport Daily Herald, 236 Miss. 303, 110 So. 2d 359 (1959); L. B. Priester & Son v. McGee, 234 Miss. 471, 106 So. 2d 394 (1958); La Dew v. LaBorde, 216 Miss. 598, 63 So. 2d 56 (1953). *See also* 1A A. LARSON, *Supra* note 9, § 37.20, at 513 for a discussion of the leading English case.

[28]The term has been variously defined and courts have admitted no invariable rule can be laid down to resolve all questions of whether an injury arose out of the employment. *See* Horovitz, *Litigious Phase: "Arising Out of" Employment,* 1950 INS. L.J. 179-88, 249-61 (1950); 3 NACCA L.J. 15-67, 419-90 (1949).

[29]Malone, *supra* note 25, at 147.

[30]232 Miss. 338, 98 So. 2d 870 (1957).

[31]*Id.* at 347, 98 So. 2d at 874.

[32]*Id.* at 347-48, 98 So. 2d at 874. *See also* V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION 201-21 (2d ed. 1967) [hereinafter cited as DUNN]; 1A A. LARSON, *supra* note 9, § 38.83, at 622.20 for discussion of medical causation.

The third essential of the basic coverage clause is that the accident occur "in the course of" the employment. An injury that "arises out of" the employment must of necessity arise in the course of employment but the contrary is not necessarily true.[33] The "course of employment" has the same meaning as the equivalent phrase "scope of employment" as used under the common law.[34] The following guidelines have been mentioned by the court:

> An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto. Larson's Workmen's Compensation Law, p. 193.
>
> A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to the employment if it carries out the employer's purposes or advances his interests directly or indirectly. Larson's Workmen's Compensation Law, p. 295.
>
> If a servant steps aside from the master's business for some purpose of his own disconnected from his employment, the relationship of master and servant is temporarily suspended and "this is so no matter how short the time, and the master is not liable for his acts during such time." Stovall v. Jepsen, 195 Miss. 115, 13 So. 2d 229, 230.[35]

Many complicated cases have developed under the "course of employment" question for which space does not permit detailed discussion in this article,[36] for example, in some cardiac cases, the acute attack has been held to be in the course of the employment although it did not occur while the claimant was actively engaged in his work or even during working hours.[37]

In summary, in heart cases as in other compensation cases, an award must be based upon the occurrence of an accidental injury arising out of and in the course of the employment.[38]

### Decisional Interpretations

Decisional rather than statutory law forms the permanent perimeter of governing legal principles in cardiac litigation. This occurs not in-

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[33]DUNN, *supra* note 32, § 168, at 223-34.

[34]Person v. Stokes, 222 Miss. 479, 76 So. 2d 517, 519 (1954); Barry v. Sanders Co., 211 Miss. 656, 52 So. 2d 493 (1951).

[35]Persons v. Stokes, 222 Miss. 479, 486, 76 So. 2d 517, 519 (1954).

[36]*See* DUNN, *supra* note 32, at 223-55; Larson, *Workmen's Compensation in Mississippi: The First Five Years,* 25 MISS. L.J. 109, 117 (1954); Satterfield, *supra* note 20, at 146.

[37]*See* Thornbrough Well Serv. Co. v. Brown, 223 Miss. 322, 78 So. 2d 159 (1955).

[38]Hungerford v. Southern Shell Fish Co., 230 So. 2d 59, 60 (Miss. 1970).

advertently but because the legislature framed the compensation laws for general application rather than conforming statutes to each individual disease or injury. Although the courts at times call for legislative guidance,[39] thus far in Mississippi the basic coverage clause of an accidental injury arising out of and in the course of the employment is applicable to heart cases as well as other claims.

### Accidental Result Versus Accidental Cause

Although there is little legislation relating to heart claims, one of the prime battlegrounds in heart litigation has been centered around the word "accident," especially in the cardiac case. This problem developed because a majority of American jurisdictions followed in some way the English definition of accident as referring simply to an unexpected happening.[40] Larson explains the problem in the following manner:

> The greatest source of controversy, however, lies in the "accidental-cause versus accidental-result" problem. Its most familiar manifestation is the "usual-exertion" case. A man who, for years, has lifted hundred-pound sacks many times a day suffers a heart attack while lifting one in the usual way, and medical testimony confirms that the heavy lift did in fact cause the attack.
>
> At once it becomes apparent that a court can announce a definition of accident as an "untoward event" or "unlooked-for mishap" without necessarily having committed itself on this exact combination of facts. It depends on whether the unlooked-for item is the cause or the effect. If it is the cause — the outward circumstances immediately preceding the injury — nothing unexpected can be shown. But if it is the result on this individual that may be unlooked for, then the injury can be described as accidental.[41]

The early decisions in many jurisdictions were not entirely clear in their attempts to resolve the controversy over the cause and effect question.[42] In Mississippi's first reported compensable heart case, *Ingalls Shipbuilding Corp. v. Byrd*,[43] the court noted:

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[39]Leake County Cooperative (A.A.L.) v. Dependents of Barrett, 226 So. 2d 608, 613-14 (Miss. 1969), where the court noted, "The legislative process affords probably the only solution to this confounding problem, since it is not within the province of the judiciary to legislate."

[40]*See* Hubbard, *Trends in Compensable Heart Incidents*, 26 Ins. Counsel J. 154 (1959).

[41]1A A. Larson, *supra* note 9, § 37.20, at 514-15.

[42]Henley, *Cardiac Problems in Workmen's Compensation Cases*, 30 Ins. Counsel J. 258 (1963).

[43]215 Miss. 234, 60 So. 2d 645 (1952).

> It is first contended that the injury is not compensable because it is not an accidental injury. The contention is properly phrased since Sec. 2(2), as amended by Chap. 412 of the Laws of 1950, defines "injury" as accidental injury.[44]

The court then stated:

> [W]e may proceed at once to examine whether an injury, activating a pre-existing disease or physical abnormality, is an accidental injury within the meaning and purpose of the Act, when such combination of causes with a resultant injury occurred while the employee was performing his duties in the customary manner. The distinction sought is that between an unexpected cause and an unexpected result. The latter is here conceded, as well as the fact established by the Commission that the injury arose out of and in the course of the employment.[45]

There was thus the question of whether or not under similar facts there could exist an accidental injury without a pre-existing heart condition and the Mississippi Supreme Court said:

> What we have repeatedly held was and is that if the work of the deceased either aggravates a pre-existing condition or precipitates a heart attack, the claim is compensable. (citations omitted)
>
> In Larson on Workmen's Compensation Law, Sec. 38.00 the author says: "The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia and the like, the injury is held accidental."[46]

Final clarification was rendered in *Priester & Son v. McGee*:[47]

> It has been stated that an injury is unexpected, so as to bring it within the category of "accident", in this connection, the workman did not intend or expect that it would result on the particular occasion from what he was doing. The mere apprehension that an injury such as did occur was likely to occur at some indefinite time in the future does not deprive the occurrence of its accidental character.[48]

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[44]*Id.* at 241, 60 So. 2d at 647.

[45]*Id.*, 60 So. 2d at 647-48.

[46]Pennington v. Smith, 232 Miss 775, 778-79, 100 So. 2d 569, 570 (1958). *See also* Railway Express Agency v. Hollingsworth, 221 Miss. 688, 75 So. 2d 639 (1954); Pearson v. Dixie Elec. Power Ass'n, 219 Miss. 844, 70 So. 2d 6 (1954); La Dew v. La Borde, 216 Miss. 598, 63 So. 2d 56 (1953).

[47]234 Miss. 471, 106 So. 2d 394 (1958).

[48]*Id.* at 479, 106 So. 2d at 397.

The Mississippi Supreme Court, in holding that compensation would be awarded where an unexpected injury occurred during normal duties even though there was no "accident" by external force or event (provided, of course, a causal connection was shown), forestalled the controversy that developed in other states which held that the injury must be accidental in its nature and "cause." In the latter jurisdictions a cardiac incident, although causally related to the performance of the claimant's usual activities, could not offer a basis for compensation, since the injury was deemed not to be accidental in origin and character.

### Usual Strain Rule Versus Unusual Strain Rule

The "accidental injury" requirement seems to be satisfied if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties.[49] As one Mississippi text writer has determined, "Any substantial exertion or stress over and above the ordinary wear and tear of life is sufficient to meet the requirement that the attack be accidental, and awards have not been denied solely because the activity was not unusual for the particular employee."[50] The court has sustained awards where at the time of the cardiac attack the employee was doing his usual work as a chipper;[51] taking a measurement in a ditch;[52] cutting of a right-of-way;[53] operating a saw;[54] sacking tung nuts;[55] climbing steps as a forestry spotter;[56] assisting other employees in placing scaffolding boards;[57] handling lumber in a saw mill;[58] slicing meat as a butcher;[59] driving a truck to work;[60] scaling logs;[61] working at a service station;[62] using a chisel and hammer;[63]

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[49]Lewis v. Trackside Gasoline Station, 233 Miss. 663, 103 So. 2d 868 (1958); Pearson v. Dixie Elec. Power Ass'n, 219 Miss. 884, 897-98, 70 So. 2d 6, 11 (1954); Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So. 2d 356 (1953).

[50]Dunn, *supra* note 32, at 121.

[51]Ingalls Shipbldg. Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952).

[52]La Dew v. La Borde, 216 Miss. 598, 63 So. 2d 56 (1953).

[53]Pearson v. Dixie Elec. Power Ass'n, 219 Miss. 884, 70 So. 2d 6 (1954).

[54]Avery v. Hall, 224 Miss. 51, 79 So. 2d 453 (1955).

[55]Pearl River Tung Co. v. John, 225 Miss. 303, 83 So. 2d 95 (1955).

[56]Schilling v. Mississippi State Forestry Comm'n, 226 Miss. 858, 85 So. 2d 562 (1956).

[57]Ingalls Shipbldg. Corp. v. Dickerson, 230 Miss. 110, 92 So. 2d 354 (1957).

[58]Lee v. Haltom Lumber Co., 230 Miss. 655, 93 So. 2d 641 (1957).

[59]Pennington v. Smith, 232 Miss. 775, 100 So. 2d 569 (1958).

[60]Goodnite v. Farm Equip. Co., 234 Miss. 342, 103 So. 2d 391 (1958).

[61]Poole v. R. F. Learned & Son, 234 Miss. 362, 103 So. 2d 396 (1958).

[62]Lewis v. Trackside Gasoline Station, 233 Miss. 663, 103 So. 2d 868 (1958).

[63]Priester & Son v. McGee, 234 Miss. 471, 106 So. 2d 394 (1958).

supervising employees;[64] picking up garbage;[65] keeping books at his desk;[66] setting cuffs in the sewing department;[67] washing dishes;[68] operating a projector in movie theater;[69] driving a truck as a professional;[70] welding; [71] and reading meters.[72]

These rulings would suggest that the court has drawn a definite and clear-cut acceptance of the usual exertion rule as leading to accidental injury. Although terminology in some decisions tends to leave the question in doubt,[73] the great majority of cases make it very clear that in Mississippi it is not necessary to show that the exertion which precipitated the harm was in itself unusual or beyond the routine of the employment.[74]

Mississippi's acceptance of the usual strain doctrine to satisfy the requirement of "accidental injury" left causality as the principal question in cardiac cases. The question then became whether the normal duties of the job caused the disabling or fatal incident. In *Ingalls Shipbuild-*

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[64]Russell v. Sohio S. Pipe Lines, 236 Miss. 722, 112 So. 2d 357 (1959).

[65]Shannon v. City of Hazlehurst, 237 Miss. 828, 116 So. 2d 546 (1959).

[66]Meridian Mattress Factory, Inc. v. Morris, 239 Miss. 792, 125 So. 2d 533 (1960).

[67]I.B.S. Mfg. Co. v. Dependents of Cook, 241 Miss. 256, 130 So. 2d 557 (1961).

[68]El Patio Motor Court, Inc. v. Long's Dependents, 242 Miss. 294, 134 So. 2d 437 (1961).

[69]B & D Theaters v. Davis, 190 So. 2d 845 (Miss. 1966).

[70]Knox Glass, Inc. v. Kennedy, 218 So. 2d 881 (Miss. 1969).

[71]Trussell v. American Sand & Gravel, 229 So. 2d 59 (Miss. 1969).

[72]City of Okolona v. Harlow, 244 So. 2d 25 (Miss. 1971).

[73]*Cf.* Dillion v. Gasoline Plant Constr. Corp., 222 Miss. 10, 75 So. 2d 80 (1954), raises the question of the unusual exertion or strain but speaks more in terms of causation, however, without a definite dichotomy of theories; Rushing v. Water Valley Coca-Cola Bottling Co., 232 Miss. 338, 98 So. 2d 870 (1957), while deciding the case on causation cites LARSON and quotes:

> The natural progress of the disease may bring it to its fatal climax during working hours, but if the employee's activity at the time involves no effort, or effort which cannot support medically a causal connection, it can be rightly said that the outcome was neither accidental nor causally related to the employment. It was not accidental simply because it did not happen by chance; it happened by the inexorable march of the disease. As the unusual exertion requirement becomes more and more weakened by exceptions and interpretations, the burden of keeping this class within proper bounds falls squarely on the shoulders of the expert medical witness and the expert trier of fact.

*Id.* at 348, 98 So. 2d at 874. The quote itself commingles the "accident" and "arising" test. Union Prod. Co. v. Dependents of Simpson, 251 Miss. 183, 168 So. 2d 808 (1964), exposes the "wear and tear" rule of New York, a rule that Larson discussed as neither an acceptance or rejection of the unusual-exertion rule.

[74]*See* Poole v. R.F. Learned & Son, 234 Miss. 362, 368, 103 So. 2d 396, 398 (1958), where the court reversed the attorney referee, commission and circuit court upon this specific point.

*ing v. Howell*[75] the supreme court reversed the commission and the circuit court on the ground that the evidence failed to establish a causal connection between the heart attack and the employee's work. The court also stated that:

> This case hinges on the question of causal connection; if Howell's work caused the heart attack or in any manner aggravated, accelerated or contributed to the attack, then Howell's heart attack is compensable.[76]

The court also adopted another standard that, from a medical standpoint, would figure prominently in future cases:[77]

> [T]he rule as to causal connection is, in part, as follows: "There must still be an unexpected result, and there must still be an exertion — some exertion — capable medically of causing collapse. . . .
>
> As the unusual-exertion requirement becomes more and more weakened by exceptions and interpretations, the burden of keeping this class of cases within proper bounds falls squarely on the shoulders of the expert medical witness and the expert trier of fact."[78]

In the next case, *Dillon v. Gasoline Plant Construction Co.*, the court, in denying compensation, said:

> [I]t was for the Commission to determine from all the testimony of both the lay and expert witnesses as to whether or not the claimants had met the burden of showing by a preponderance of the evidence that there was a causal connection between the work of the employee and his sudden death. . . .[80]

Although at times the "accidental injury" and "arising out of" questions were commingled,[81] the court for the most part sought the

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[75]221 Miss. 824, 74 So. 2d 863 (1954).

[76]*Id.* at 830, 74 So. 2d at 864-65.

[77]Causal connection questions had been discussed in prior cases. Railway Express Agency v. Hollingsworth, 221 Miss. 688, 74 So. 2d 754, 756 (1954); Pearson v. Dixie Elec. Power Ass'n, 219 Miss. 884, 897-98, 70 So. 2d 6, 11 (1954); Fischer v. Gloster Lumber & Builders Supply Co., 57 So. 2d 871, 872 (Miss. 1952). Although in these cases, the causal connection of the exertion and work had not been required to be supported medically, subsequent cases noted that the factual question of causal connection was usually one for medical experts and the trier of facts.

[78]Ingalls Shipbldg. Corp. v. Howell, 221 Miss. 824, 831, 74 So. 2d 863, 865 (1954).

[79]222 Miss. 10, 75 So. 2d 80 (1954).

[80]*Id.* at 18, 75 So. 2d 83.

[81]Poole v. R. F. Learned & Son, 234 Miss. 362, 368, 103 So. 2d 396, 398 (1958), where the court stated:

> It is not necessary to show that the exertion which concurred in precipitating the harm was in itself unusual or beyond the routine of the employment. Provided the causal relation to the employment is shown, aggravating, pre-

resolution on the issue of causation ("arising out of"),[82] at times awarding compensation[83] and at other times denying compensation.[84] In *Kersh v. Greenville Sheet Metal Works*[85] the court in a well-reasoned opinion succinctly stated the central factual issues:

> In heart cases, it is said that the burden, as usual, is upon the claimant and that the rule of liberality cannot dispense with the necessity of proof of facts prerequisite to recovery and that causal connection is one of such facts. The factual issue on this score is usually one for the medical experts and the Commission as trier of the facts, and the Commission may not award compensation in the absence of medical proof to show causal connection. The issue in heart cases is not such as may be resolved upon common or judicial knowledge and this is so although the medical testimony contains an admission of a possibility of causal connection.[86]

With the compensability question resting on causally relating the injury and employment, the medical experts and triers of fact had the burden of decision thrust upon them.[87] It has been in this light that the "unusual exertion" requirement has been used at times as a device to ensure causal connection, especially as far as medical testimony is concerned. For example, soon after enacting workmen's compensation laws, Mississippi adopted the following rule regarding medical causation:

> There must still be an unexpected result, and there must still be an exertion — some exertion — capable medically of causing the collapse. This can by no means be taken for

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cipitating, or combining with the disease or infirmity to produce the death, the exertion may be the usual and customary, and still satisfy the requirement that the injury be accidental and arise out of the employment.

*See also* Moon v. Erwin Mills, Inc., 244 Miss. 573, 145 So. 2d 465 (1962).

[82]In Capitol Broadcasting Co. v. Wilkerson, 240 Miss. 64, 69, 126 So. 2d 242, 244 (1961), the court said: "In diseases (arteriosclerosis) of this sort, workmen's compensation claims are allowed on the basis of causal connection."

[83]Cases awarding compensation are numerous. *See, e.g.,* Priester & Son v. McGee, 234 Miss. 471, 106 So. 2d 394 (1958); Lewis v. Trackside Gasoline Station, 233 Miss. 663, 103 So. 2d 868 (1958); Pennington v. Smith, 232 Miss. 775, 100 So. 2d 569 (1958); Pearl River Tung Co. v. John, 225 Miss. 303, 83 So. 2d 95 (1955); Ingalls Shipbldg. Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952).

[84]*See, e.g.,* McCarley v. Iuka Shirt Co., 258 So. 2d 421 (Miss. 1972); Southern Brick & Tile Co. v. Clark, 247 So. 2d 692 (Miss. 1971); McCain v. West Implement Co., 246 So. 2d 93 (Miss. 1971); Mize v. Hankins Elec. Co., 240 So. 2d 627 (Miss. 1970); Hungerford v. Southern Shell Fish Co., 230 So. 2d 59 (Miss. 1970).

[85]192 So. 2d 266 (Miss. 1966).

[86]*Id.* at 268, *quoting* DUNN, *supra* note 32, § 52.

[87]Cases cited note 68 *supra*; 1A A. LARSON, *supra* note 9, § 38.83, at 622.20, where the author notes: "The burden of keeping this class of cases within proper bounds falls squarely on the shoulders of the expert medical witness and the expert trier of fact."

> granted. If heart failure overtakes the employee while he is merely waiting for a bus or an elevator, you simply have no strain at all to provide an accidental result of employment activity. The natural progress of the disease may bring it to its fatal climax during working hours, but if the employee's activity at the time involves no effort, or effort which cannot support medically a causal connection, it can be rightly said that the outcome was neither accidental nor causally related to the employment. It was not accidental simply because it did not happen by chance; it happened by the inexorable march of the disease.[88]

A claim for compensation may be denied upon failure to medically prove an employment-oriented causation. Several examples of medical testimony that have defeated recovery are: (1) direct physical evidence, perhaps from an autopsy,[89] by the determination of the approximate age of a myocardial infarct or other lesions; (2) medical opinion denying any causal relationship with an absence of testimony to the contrary;[90] and (3) medical testimony for the employee which is too speculative or too weak to meet the burden of proof.[91] Medical testimony may be difficult if not impossible to decipher in these cases. If such testimony is unaided either by evidence connecting the cardiac incident with the employment or by a presumption,[92] the cause is lost. Probably the most common reason for a denial is the general inadequacy of proof causally relating the injury medically with the employment.[93] On the other hand, medical causation has been the primary basis for many successful claims, especially at the appellate levels where the commission has found for the employee with supporting medical testimony.

### Wear and Tear Rule

The "wear and tear" rule was conceived through an effort to alleviate the necessity for unusual exertion in satisfying the "accidental"

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[88]Ingalls Shipbldg. Corp. v. Howell, 221 Miss. 824, 831, 74 So. 2d 863, 865 (1954).

[89]Laskey, *The Importance of Autopsies in Workmen's Compensation Cardiac Fatalities,* 15 J. For. Sci. 507 (1970).

[90]McCarley v. Iuka Shirt Co., 258 So. 2d 421 (Miss. 1972); Rushing v. Water Valley Coca-Cola Bottling Co., 232 Miss. 388, 98 So. 2d 870 (1957); Halbert v. Lamar Advertising Agency, 231 Miss. 437, 95 So. 2d 535 (1957).

[91]Southern Brick & Tile Co. v. Clark, 247 So. 2d 692 (Miss. 1971); Mize v. Hankins Elec. Co., 240 So. 2d 627 (Miss. 1970); Babcock & Wilcox v. Roby, 246 Miss. 160, 150 So. 2d 129 (1963); Itawamba Mfg. Co. v. Christian, 244 Miss. 587, 145 So. 2d 161 (1962); Franks v. Goyer Co., 234 Miss. 833, 108 So. 2d 217 (1959).

[92]Dependents of Moon v. Erwin Mills, Inc., 244 Miss. 573, 145 So. 2d 465 (1962).

[93]Hungerford v. Southern Shell Fish Co., 230 So. 2d 59 (Miss. 1969); Knox Glass, Inc. v. Evans, 197 So. 2d 784 (Miss. 1967); Union Prod. Co. v. Simpson, 251 Miss. 183, 168 So. 2d 808 (1964).

demands of the compensation statutes in many states.[94] It cannot be described as an acceptance or rejection of the usual exertion rule, since it was pressed into service as a supplement or exception to the existing usual exertion rule in New York.[95] The New York Court of Appeals said the rule meant that an exertion which was regular and routine to an employee's usual employment duties could be the basis of an award if, and only if, it was greater than the ordinary wear and tear of non-employment life. However, the court also added a caveat that there must be medical causation shown to have been precipitated by the unusually hard work thus demanded.[96]

In *Union Producing Co. v. Dependents of Simpson,*[97] Mississippi applied the "wear and tear" rule.[98] The court said:

> If there was any contributing factor to the attack other than the progress of the disease, it was not the work Employee was doing but the ordinary wear and tear of life to which every person is subjected who is not in bed.
>
> This record overwhelmingly shows that Employee's death was the result of the natural progress of coronary insufficiency, or atherosclerosis, which reached its climax during Employee's working hours, and any connection between his work and his death was coincidental. . . . In several of the cited cases it was held that where the stress and strain of the job are not more than the ordinary wear and tear of life, there is no legal connection between a heart attack and the work.[99]

The court thus relied upon the "wear and tear" doctrine to establish a legal connection between the heart attack and the employment, and it made the rule one of causation. The court, viewing the case through the maze of prior decisions, was attempting to establish a test that would define what kind of exertion satisfied the "arising out of the employment" requirement, leaving the medical test of causation[100] to expert determination (provided the legal requirement was met).

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[94] 1A A. LARSON, *supra* note 9, § 38.30, at 559-60.

[95] *Id.* § 38.64 (a), at 616.

[96] Larson, *Analysis and Suggested Solution, supra* note 1.

[97] 251 Miss. 183, 168 So. 2d 808 (1964).

[98] *Union Producing* has been distinguished in Trussell v. American Sand & Gravel Co., 229 So. 2d 59 (Miss. 1969); Leake County Cooperative (A.A.L.) v. Barrett, 226 So. 2d 608 (Miss. 1969); Washington v. Greenville Mfg. & Mach. Works, 223 So. 2d 642 (Miss. 1969); Mississippi Ass'n of Ins. Agents v. Seay, 218 So. 2d 413 (Miss. 1969); and never cited as controlling.

[99] Union Prod. Co. v. Dependents of Simpson, 251 Miss. 183, 194, 168 So. 2d 808, 812 (1964).

[100] *See* Schneider, *Another Treatise on Workmen's Compensation Law,* 20 MISS. L.J. 154, 160 (1948), which stated, "You were overcome by sunstroke or heartstroke. It is not compensable, unless there is something connected with the employment that con-

This reasoning, which is compatible with recommended solutions to cardiac cases [101] and refinement in areas of medical causation,[102] could render significant aid in the resolution of the cardiac problem in Mississippi. Whether the doctrine will have a lasting effect in Mississippi remains to be seen. However, with the advent of *Simpson,* the liability of the employer must be established by the occurrence of an accidental injury arising out of and in the course of the employment. A causal connection must be established between the cardiac episode and the employment activity, and the employment activity must involve some exertion or stress medically causing the cardiac episode. Legally, the mere presence of an employee at work is not sufficient in itself to constitute causal connection, nor is causal connection established by the fact that the employee should have been in the hospital.[103] Also, under *Simpson,* the exertion or stress experienced due to the employment must be greater than the ordinary wear and tear of life to which every person is subjected.[104]

### Rebuttable Presumption

Generally the burden is on the claimant to prove, beyond speculation or conjecture,[105] an accidental injury arising out of the course of the employment and a causal connection between the injury and the

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tributed to the injury — something that causes you to be more exposed to the danger than the people of the community generally."

[101]Larson, *Analysis and Suggested Solution, supra* note 1, at 468.

[102]*See,* Hellmuth and Hellmuth, *Heart Attack and Workmen's Compensation: Model Rules of Practice,* IV The Forum 113 (Jan. 1969).

[103]Union Prod. Co. v. Simpson, 251 Miss. 183, 193, 168 So. 2d 808, 812 (1964). Compare the court's comments in cases held compensable where medical testimony reflected the decedent should have been in bed. Goodnite v. Farm Equip. Co., 234 Miss. 342, 103 So. 2d 391 (1958); Poole v. R.F. Learned & Son, 234 Miss. 362, 103 So. 2d 396 (1958).

[104]Union Prod. Co. v. Simpson, 251 Miss. 183, 194, 168 So. 2d 808, 812 (1964). *But see* Mississippi Ass'n of Ins. Agents v. Dependents of Seay, 218 So. 2d 413 (Miss. 1969), where the claimant died during the night in his motel bed after having dinner and attending the theater.

[105]Franks v. Goyer, 234 Miss. 833, 838, 108 So. 2d 217, 219 (1959), where the court said, "It has been held, however, that mere possibility does not suffice to forge the causal link between accident and disability and petitioner must do more than show that his disability could have been the result of the accident." *See also* Southern Brick & Tile Co. v. Clark, 247 So. 2d 692 (Miss. 1971); Babcock & Wilcox v. Roby, 246 Miss. 160, 150 So. 2d 129 (1963); Itawamba Mfg. Co. v. Dependents of Christian, 244 Miss. 587, 145 So. 2d 161 (1962). *But see* Holman v. Standard Oil Co., 242 Miss. 657, 666, 136 So. 2d 591, 594 (1962), where the court found that a "scrupulously honest" doctor could use "may have" and the court would consider it a reasonable probability.

claimed disability.[106] Claimants have extracted from the court certain presumptions that assist in sustaining this burden. In *Pearson v. Dixie Electric Power Association,*[107] the Mississippi Supreme Court recognized the rule as applicable to heart cases, and noting its prior adoption in *Majure v. William H. Alsup & Associates,*[108] the court said:

> The presumption that, where an employee charged with the performance of a duty is found injured or dead at a place where it would be necessary for him to be in performing the duty, the employee was injured or died under circumstances indicating an accident arising out of and in the course of his employment, as being due to a sudden or unexpected breakdown of some portion of the internal structure of the body, or from heat exhaustion, is supported by the cases . . . and this presumption was recognized by our own Court. . . .[109]

To term the existent presumption as applied in heart cases as rebuttable might, in certain instances, be overstating the case. Any attempt to analyze or justify the heart decisions regarding presumptions is to enter a veritable bramble bush of the law from which even the court seems unable to extricate itself.

A recent article[110] on this topic comments on the present predicament:

> The "found dead" or "fall dead" presumption utilized in Mississippi has, since its application to causal relationship, been a troublesome maverick. It is not grounded in human experience and absolutely defies known medical science. The original "scope of employment" presumption applied to "found dead" cases was quite reasonable. It was bottomed on sound general principles recognized in this state and many others. It was quite reasonable to require an employer to show affirmatively if a servant had deviated from the course of his employment. The employer was in the best position to offer proof in this connection. But when it comes to inferring or presuming causal relationship just by virtue of presence on the job at the time of death or the onset of symptoms, there is a painful lack of logic. Who is in a better position to prove the cause of death and its relation to employment than the widow or next of kin? The employer has not been granted any express right of autopsy and frequently many months expire before a claim is made. The rule adopted by our court in these cases constitutes an unreasonable and unnecessary burden on employers and is a radical departure from traditional concepts of burden of proof.[111]

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[106]Narkeeta, Inc. v. McCoy, 247 Miss. 65, 153 So. 2d 798 (1963).

[107]219 Miss. 884, 70 So. 2d 6 (1954).

[108]216 Miss. 607, 63 So. 2d 113 (1953).

[109]219 Miss. 884, 70 So. 2d 6 (1954).

[110]Lagrone, *Let's Abolish the "Found Dead" Presumption,* 41 MISS. L.J. 233 (1970).

[111]*Id.* at 240.

The foregoing comments were made prior to *City of Okolona v. Harlow*[112] which again extends the limits of reason.

In spite of the above arguments, it is now well settled that the "found dead" presumption applies to the issues of "causal connection" or "arising out of" as well as to the issue of in the "course of employment."[113] In cardiac cases, however, the court had its usual struggle in determining the full impact of the presumption. In *Pearson* the court said that the presumption made out a prima facie case and shifted to the employer the burden of providing evidence to overthrow it. The court noted that the defendants failed to introduce any medical testimony to contradict the physician on behalf of the claimants but did not say this would have been sufficient to rebut the presumption.[114] The court followed the *Pearson* decision by holding that an employee who did not sustain an accident or suffer an injury on the job and who died at home about 9:00 p.m., after leaving his painting job at 5:00 p.m., was unaided by the presumption.[115]

In spite of the application of the presumption in many death cases, it was recognized that the overall burden of proof remained with the claimant, and when evidence is produced establishing that the deceased was not engaged in his employer's business the presumption vanishes and cannot support an award.[116] It was also established that the onset of the heart attack must occur while the employee is about his work and engaged in the duties of his employment for the presumption of causal connection to be applicable.[117] In *Highway Patrol v. Neal's Dependents,*[118] the commission was criticized for its failure to recognize that the presumption was rebuttable rather than conclusive, and in *El Patio Motor Court, Inc. v. Long's Dependents,*[119] the commission was criticized for applying the presumption when circumstantial evidence would suffice. Also,

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[112]244 So. 2d 25 (Miss. 1971).

[113] Lagrone, *supra* note 110.

[114]219 Miss. 884, 70 So. 2d 6 (1954).

[115]Dillon v. Gasoline Plant Constr. Corp., 222 Miss. 10, 75 So. 2d 80 (1954). *See also* Dependents of Moon v. Erwin Mills, Inc., 244 Miss. 573, 145 So. 2d 465 (1962), where the employee died at home and the court noted the "claim was not supported by any presumption under the Workmen's Compensation Law that an employee found dead on the job is presumed to have died in the course of his employment and as a result thereof." *Id.* at 577, 145 So. 2d at 465.

[116]Winters Hardwood Dimension Co. v. Dependents of Harris, 236 Miss. 757, 112 So. 2d 227 (1959).

[117]Russell v. Sohio S. Pipe Lines, Inc., 236 Miss. 722, 731, 112 So. 2d 357, 360 (1959).

[118]239 Miss. 505, 124 So. 2d 120 (1960).

[119]242 Miss. 294, 134 So. 2d 437 (1961).

the presumption, when established,[120] can be rebutted by developing the facts in full, including the employee's pre-existing condition, the details of the work up to death, and the cause of death.[121] In *Washington v. Greenville Manufacturing & Machine Works*[122] the court apparently added another requirement to rebut the presumption by requiring proof that the work activities did not "cause" the death.[123] Some employers subsequent to *Washington* have failed to rebut this presumption[124] while others have successfully rebutted it.[125] If the injury does not result in death, the court has ruled that there is "doubt" that any presumption of causal connection arises.[126]

In *Mississippi State University v. Hattaway*,[127] the applicability of the presumption was extended to include "fall dead" cases where the cause of death was totally unexplained even though the employee was in full view of others.[128] The court added in a later death case that it indulged in the presumption in the *Hattaway* "fall dead" case since there was evidence that the employee's work activities had contributed to his illness and sudden, unexplained death.[129] In a subsequent, unexplained death case which did not occur on the employer's premises the court ruled that the presumption of causal connection must be denied since the evidence supported the commission's finding that the death was not causally related to the employment.[130] Whether the court will demand that future "fall dead" cases require evidence sustaining a causal connection to constitute a prima facie case is yet to be decided.

It is important to remember that once sufficient proof is provided

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[120]In Erwin v. Hayes, 236 Miss. 123, 109 So. 2d 156 (1959), the court required the claimant to prove that the deceased employee was found dead where his duties required him to be; proof of death was not sufficient.

[121]Union Prod. Co. v. Simpson, 251 Miss. 183, 194, 168 So. 2d 808, 813 (1964).

[122]223 So. 2d 642 (Miss. 1969).

[123]*Id.* at 647.

[124]City of Okolona v. Harlow, 244 So. 2d 25 (Miss. 1971); Leake County Cooperative (A.A.L.) v. Barrett, 226 So. 2d 608 (Miss. 1969).

[125]McCarley v. Iuka Shirt Co., 258 So. 2d 421 (Miss. 1972); Mize v. Hankins Elec. Co., 240 So. 2d 627 (Miss. 1970); Hungerford v. Southern Shell Fish Co., 230 So. 2d 59 (Miss. 1970).

[126]Kersh v. Greenville Sheet Metal Works, 192 So. 2d 266, 268 (Miss. 1966).

[127]191 So. 2d 418 (Miss. 1966).

[128]*See* City of Okolona v. Harlow, 244 So. 2d 25 (Miss. 1971), where the court demanded the "golden words" of aggravation, precipitation or contribution be used and demanded such exactness in cause of death that probably only divine guidance can afford. *See also* the earlier case of Winters Hardwood Dimensions, Co. v. Dependents of Harris, 236 Miss. 757, 112 So. 2d 227 (1959), which is referred to as a "found dead" case but is factually similar to *Hattaway* and the death was unexplained.

[129]Hungerford v. Southern Shell Fish Co., 230 So. 2d 59 (Miss. 1969).

[130]Southern Brick & Tile Co. v. Clark, 247 So. 2d 692 (Miss. 1971).

to activate the presumption,[131] it is a rebuttable, procedural rule of law and does not shift the burden of proof from the claimant to the defendant.[132] The procedural burden of going forward with the evidence necessary to rebut is on the defendant. When the requirements to rebut the presumption are met, the presumption has served its purpose and disappears and the case is decided on the evidence, free from any favorable presumption.[133]

### The Reviewing Court and the Substantial Evidence Rule

The initial hearing in compensation cases is before the Workmen's Compensation Commission's attorney referee.[134] The attorney referee is no more than a "facility" for conducting the business of the commission and the commission remains the trier of fact.[135] Therefore, under existing practice the attorney referee either denies or approves an award and the aggrieved party appeals to the full commission for review. The commission then acts as a factfinding agency, although usually having no personal contact with witnesses and viewing the evidence solely upon the record below. As a factfinding tribunal the commission has wide latitude in the ascertainment of facts.[136] The commission must weigh and evaluate the testimony of the lay and medical witnesses and base its findings upon the evidence as a whole,[137] not on isolated portions of the record.[138]

The aggrieved party at the commission level must perfect an appeal to the circuit court of the county where the injury occurred.[139] This is, for the most part, an exercise in futility, costly in time and money for all parties. The circuit court is, in effect, an intermediate appellate court and is bound by the same rules governing a court of last resort, therefore the decisions of the circuit court are said to be limited to questions of law.[140] Appeals from adverse rulings of the circuit court to the

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[131]Erwin v. Hayes, 236 Miss. 123, 109 So. 2d 156 (1959).

[132]Dunn, *supra* note 32, § 269.

[133]Kersh v. Greenville Sheet Metal Works, 192 So. 2d 266, 268 (Miss. 1966).

[134]Miss. Code Ann. § 6998-24 (1952).

[135]Railway Express Agency v. Hollingsworth, 221 Miss. 688, 696, 74 So. 2d 754, 756 (1954).

[136]*See* Miss. Code Ann. § 6998-24 (1952); Miss. Code Ann. § 6998-43 (c) (Supp. 1972).

[137]Mississippi Prod., Inc. v. Skipworth, 238 Miss. 312, 323, 118 So. 2d 345, 350 (1960).

[138]Kennedy v. Williams-McWilliams Indus., Inc., 247 Miss. 595, 602, 156 So. 2d 806, 809 (1963).

[139]Miss. Code Ann. § 6998-26 (1952).

[140]Sam Jones Casing Crews v. Dependents of Skipper, 199 So. 2d 436, 438 (Miss. 1969).

supreme court are in the manner generally required by law in other cases.[141]

It is in the court of last resort where heart cases have received most notoriety because of the court's application of the "substantial evidence" rule. The rule generally stated is that if the decision of the commission is supported by substantial evidence it must be approved on appeal and is sometimes said to be conclusive.[142] In *Dillion v. Gasoline Plant Construction Corp.*[143] the court, in affirming a denial by the commission in a heart-death case, stated:

> In view of the conflict in the evidence we are not justified under all of the facts and circumstances in this case in substituting our judgment in the place and stead of that of the attorney-referee, full commission and circuit court.[144]

The court subsequently held that on "disputed" questions of facts supported by substantial evidence it would not reverse the commission.[145] This substantial evidence rule seemed to have been well established in heart cases as well as other cases[146] until *Hicks,*[147] *Shivers,*[148] *Harris,*[149] and *Russell*[150] came on the horizon like the four horsemen of the apocalypse. The supreme court reversed the findings of fact by the commission in each case and there was serious doubt then, as there is today, whether the substantial evidence rule survived.[151]

In *Central Electric Power Association v. Hicks,*[152] the court announced that the rule as an abstract statement was correct but that it was sufficiently flexible to permit the court to check the fundamentally erroneous exercise of administrative power, and in giving the statute a broad and liberal construction the court would use practical, commonsense logic. In *Russell v. Sohio Southern Pipeline, Inc.,*[153] the court interpreted the terminology of *Hicks* to mean that, notwithstanding conflicting testimony and the commission's findings supported by substantial evidence, the court would seek to ascertain whether or not the "beneficient purpose"

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[141]MISS. CODE ANN. § 6998-26 (1952).

[142]Malley v. Over the Top, 229 Miss. 347, 355, 90 So. 2d 678, 681 (1956).

[143]222 Miss. 10, 75 So. 2d 80 (1954).

[144]*Id.* at 19, 75 So. 2d at 83.

[145]Freeman v. Mississippi Power & Light Co., 230 Miss. 396, 92 So. 2d 658 (1957).

[146]*See* DUNN, *supra* note 32, § 289, at 403 n.66.

[147]Central Elec. Power Ass'n v. Hicks, 236 Miss. 378, 110 So. 2d 351 (1959).

[148]Shivers v. Biloxi-Gulfport Daily Herald, 236 Miss. 303, 110 So. 2d 359 (1959).

[149]Winters Hardwood Dimension, Co. v. Dependents of Harris, 236 Miss. 757, 112 So. 2d 227 (1959).

[150]Russell v. Sohio S. Pipe Lines, Inc., 236 Miss. 722, 112 So. 2d 357 (1959).

[151]*See Id.* at 391-92, 110 So. 2d at 358; 31 MISS. L.J. 113 (1959).

[152]236 Miss. 378, 110 So. 2d 351 (1959).

[153]236 Miss. 722, 112 So. 2d 357 (1959).

of the law was carried out.[154] Several subsequent cases have held that the substantial evidence rule still prevails,[155] while others have employed unusual means of reversing the trier of facts.[156] One justice announced:

> [W]e decline to open the fabled box of Pandora and thereby release all the ills and woes to which this Court will be subjected by becoming likewise a trier of facts.[157]

Nevertheless, the same justice opened the box in a later case, *Leake County Cooperative (A.A.L.) v. Dependents of Barrett*,[158] in which the court held adversely to the commission in the face of strong medical testimony to the contrary. The court has recently announced that it will consider cases purely and simply as an appellate court,[159] that it will affirm the commission on a disputed issue of fact in the absence of "unusual circumstances,"[160] and that it will test each particular case on its own facts.[161]

After a careful review of the cases, it appears that the supreme court's position in cardiac cases is a relaxed substantial evidence standard where the commission has denied an award and a commitment to the rule's application where there was an award by the commission on disputed issues.

## Conclusion

The lack of stare decisis in presumption cases and the lack of continuity in applying legal and medical tests in other cases has left those

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[154]*Id.* at 732, 112 So. 2d at 361.

[155]McCain v. West Implement Co., 246 So. 2d 93 (Miss. 1971); Hungerford v. Southern Shell Fish Co., 230 So. 2d 59, 60 (Miss. 1970); Capitol Broadcasting Co. v. Wilkerson, 240 Miss. 64, 70, 126 So. 2d 242, 244 (1961).

[156]*See* Washington v. Greenville Mfg. & Mach. Works, 223 So. 2d 642 (Miss. 1969); Leake County Cooperative (A.A.L.) v. Dependents of Barrett, 226 So. 2d 608 (Miss. 1969).

[157]New & Hughes Drilling Co. v. Smith, 219 So. 2d 657, 660 (Miss. 1969).

[158]226 So. 2d 608 (Miss. 1969). The court returned the case to the commission for apportionment noting that there was no proof in the record as to percentage of contribution attributable to the pre-existing heart condition. On remand, and with adequate testimony to substantiate it, the attorney referee, full commission and circuit court awarded the dependents of Barrett $125, holding that the employee's duties contributed 1 percent or less to his death. The supreme court again reversed and remanded the case, holding the award insufficient. Dependents of Barrett v. Leake County Cooperative (A.A.L.), 24[illegible] So. 2d 387 (Miss. 1971). As of this date it has not returned to the court.

[159]Knox Glass, Inc. v. Kennedy, 218 So. 2d 881, 883 (Miss. 1969).

[160]Trussell v. American Sand & Gravel Co., 229 So. 2d 59, 60 (Miss. 1969).

[161]Mississippi Ass'n of Ins. Agents v. Dependents of Seay, 218 So. 2d 413, 417 (Miss. 1969).

concerned with compensation of cardiovascular problems in a quandry.[162]

Other states, coming to grips with the same problems, have reached varied results: Kentucky requires a traumatic injury before compensation is awarded;[163] Nevada has made all heart cases statutorily non-compensable;[164] Utah and Washington have established minimum medical criteria by which cardio claims are determined.[165] This perplexing question has spawned both detailed analysis[166] and suggested solutions, from a legal[167] and medical standpoint.[168]

Mississippi needs to banish the presumption from compensation heart cases by legislative action, or, at least, to return it to its original intended application in the "scope of employment" area. Also, autopsies ought to be required in death cases as a prerequisite to filing.[169] The

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[162]While not directly related to this article, one of the most sweeping and significant changes in the Mississippi Workmen's Compensation Law occurred in 1960 when the legislature added an apportionment section to the Act. MISS. CODE ANN. § 6998-04 (Supp. 1972). It was enacted because the near certainty of compensability in heart cases proved detrimental not only to employer and carrier, but also to employees, since an employee who suffered a heart attack found it practically impossible to obtain employment. However, this amendment has been a problem to interpret and a fertile source of litigation. The apportionment section, as well as recent cases interpreting it, are important for the practitioner's consideration in heart as well as other compensation cases. *See* DUNN, *supra* note 32, at 55.

[163]H. MCNIECE, HEART DISEASE AND THE LAW 271 (1961).

[164]NEV. REV. STAT. § 616.110 (2) (1968).

[165]6 WILLAMETTE L.J. 95, 97 (1970).

[166]MCNIECE, *supra* note 163, contains a comprehensive study of the compensation laws in each state.

[167]Larson, *Analysis and Suggested Solution, supra* note 1, at 468.

[168]*See* Council on Community Service and Education of the American Heart Association, *Report of the Committee on the Effect of Strain and Trauma on the Heart and Great Vessels,* 26 CIRCULATION 612, 618 (1962), in which the Medical-Pathological Subcommittee made the following recommendations:

> 1. That action be taken to improve the quality of medical testimony and that this be considered the duty of the individual state medical societies with the cooperation of the American Heart Association and the American Medical Association, if requested.
>
> 2. That in view of the current absence of acceptable scientific confirmation, heart disease, except in the rare instances mentioned, shall not be considered as arising out of employment and that presumptive legislation affirming causal relationship of heart disease to any type of employment is unjustified by present scientific evidence.
>
> 3. That heart failure, either of the congestive type (with acute cardiac dilation or rhythm disturbance), or of the coronary insufficiency type (with angina pectoris or other evidence of myocardial ischemia or sudden death), or of the myocardial infarction type (with or without survival), shall be considered related to physical or emotional exertion only if the heart failure occurs during the actual period of stress clearly unusual for the individual involved.

[169]Lasky, *The Importance of Autopsies in Workmen's Compensation Cardiac Fatalities,* 16 J. FOR. SCI. 567 (1970).

court must define which types of exertion satisfy the test of "arising out of the employment" and let the medical experts determine whether the exertion (the legal test having been met) in fact causes the collapse. Once the legal and medical tests for causation are established, consistency in the appellate consideration of cardiovascular injuries will naturally result.

# COMMENTS

## MARRIAGE VS. EDUCATION: A CONSTITUTIONAL CONFLICT

Due to the increase in the incidence of early marriages in secondary schools, regulations which restrict married pupils have been the center of an increasing controversy.[1] Conflicting policy factors create a special problem in relation to married students. Marriage has traditionally been favored by public policy.[2] It has been clearly established by the courts that a student does not lose his constitutional rights when entering the educational environment.[3] On the other hand, school boards have advanced a number of educational considerations as factors which necessitate restrictions on married students.[4] Courts have continually expressed a reluctance to interfere with the judgment of school boards as long as their actions were not arbitrary or unreasonable.[5]

Restrictions on the attendance of a married student in a public school[6] were first litigated in 1929 in the Mississippi case of *McLeod v. State ex rel Colmer*.[7] There a girl between 15 and 16 years of age was denied admission to a high school because of an ordinance barring

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[1]This problem was recognized in a very novel way by one work which stated: "When teenagers combine wedding bells with school bells, the resulting commotion may sound like alarm bells to boards of education and school administrators." K. Alexander, R. Corns, & W. McCann, Public School Law 570 (1969). *See also* R. Hamilton & P. Mort, The Law And Public Education 515 (2d ed. 1959); M. Nolte, Guide To School Law 75 (1969); E. Reutter & R. Hamilton, The Law of Public Education 513 (1970).

[2]*See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Holt v. Shelton, 341 F. Supp. 821, 822 (M.D. Tenn. 1972).

[3]*See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).

[4]Most justifications are centered around health, safety or welfare problems. There is a special concern by many administrators that married students are a corrupting influence on their innocent peers.

[5]*See, e.g.*, Board of Dir. of Indep. School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Board of Educ. of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. App. 1964); Estay v. Lafourche Parish School Bd., 230 So. 2d 443 (La. App. 1969); McLeod v. State *ex rel.* Colmer, 154 Miss. 468, 122 So. 737 (1929); Starkey v. Board of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P.2d 718 (1963).

[6]The first reported litigation involving dismissal from a school because of marriage involved a private girls school in 1927. In Hall v. Mount Ida School For Girls, Inc., 258 Mass. 464, 155 N.E. 418 (1927), the expulsion was upheld on the grounds that the marriage of the student was not anticipated in the contractual relationship between the parties. *See also* 6 Tenn. L. Rev. 143 (1928).

[7]154 Miss. 468, 122 So. 737 (1929).

married persons from the schools. The court, relying heavily on the state compulsory education laws and the public policy in favor of marriage, ruled that this ordinance was arbitrary and unreasonable. The court discounted the theory that married students would have an adverse effect on their peers and stated:

> Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefitted instead of harmed. And, furthermore it is commendable in married persons of school age to desire to pursue their education, and thereby become fitted for the duties of life. And they are as much subject to the rules of the school as unmarried pupils, and punishable to the same extent for a breach of such rules.[8]

The *McLeod* ruling, which would seem to be liberal for its day, was only the first of a long line of cases concerning the rights of married students in the public schools. This comment will center on the following problems in that area: (1) compulsory attendance and restrictions on the attendance of married students; (2) restrictions on attendance of pregnant girls and unwed mothers; (3) limitation of extracurricular activities of married students.

## Application of Equal Protection

Although regulations attempting to restrict the attendance or activities of married students have been unsuccessful in many courts, some school districts continue such restrictions.[9] The most favorable consideration of the constitutional claims of students will usually come in a federal district court. The plaintiff may seek declaratory

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[8] *Id.* at 475, 122 So. at 738-39.

[9] One commentator discovered that over two-thirds of school units he surveyed placed some restrictions on married students ranging from enrollment in special programs to dismissal. Knowles, *High Schools, Marriage, and the Fourteenth Amendment,* 11 J. Fam. L. 711, 712 & n.1 (1972).

The rather ambiguous restrictions imposed by one Mississippi school district state:

> Where possible, married students and other students readmitted to the school district after a prolonged absence caused by pregnancy, will continue their educational program by special adult education programs (continuing education) rather than through the . . . . regular educational channels.
>
> In considering the question of married students in the McComb School system, the Board shall act in good faith according to its best judgment and shall determine what is best for the order and discipline of the school.

Letter from J. D. Prince to John P. Price, October 9, 1972.

and injunctive relief under the Civil Rights Act of April 20, 1871,[10] and the Declaratory Judgments Act.[11] Jurisdiction of the court in these matters is based on 28 U.S.C. §§ 1343, 2202 and 42 U.S.C. §§ 1981 *et seq.*[12]

The power of a school board to restrict married students depends largely on an interpretation of 14th amendment equal protection problems. Can school boards treat married students as a special class and, if so, are the measures taken arbitrary or unreasonable?

The United States District Court for the Northern District of Mississippi recently expounded an equal protection standard for school board regulations:

> The rules for testing a discrimination have been summarized as follows: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary (citations omitted).
>
> To these rules we add the caution that "discriminations of an unusual character especially suggests careful consideration to determine whether they are obnoxious to the constitutional provision." (citations omitted).[13]

It is in the special light of 14th amendment equal protection that these problems must be examined. Courts must balance the state's interest in such regulation against the rights of married students to obtain an education.[14]

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[10]42 U.S.C. § 1983 (1970).

[11]28 U.S.C. §§ 2201-02 (1970).

[12]For an excellent discussion of procedure and problems in the area of school discipline cases *see* Angerman & Smith, *Constitutional Defenses to a School Discipline Case,* 17 PRAC. LAW. 45 (April, 1971).

[13]Perry v. Grenada Mun. Sep. School Dist., 300 F. Supp. 748, 751 (N.D. Miss. 1969) (readmitting unwed mother).

[14]Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. PA. L. REV. 373, 397 (1969).

### Compulsory Attendance

It is a paradox that some school districts try to compel the attendance of married students while others try to prohibit it. In *State v. Priest*[15] a 15-year-old married girl was charged with delinquency because of her truancy from school. In reversing the judgment of the juvenile court, the Louisiana Supreme Court ruled:

> The marriage relationship, regardless of the age of the persons involved, creates conditions and imposes obligations upon the parties that are obviously inconsistent with compulsory school attendance or with either the husband or wife remaining under legal control of parents or other persons.[16]

Three years later the Louisiana court upheld this doctrine in the case of *In re Goodwin,*[17] a decision involving a 14-year-old female. In 1962 a New York court followed the trend of exempting married minors from compulsory attendance laws.[18] This family court viewed the attendance of a married 15-year-old as a possible detriment to the health, safety and welfare of her classmates. Several states now have statutes which expressly exclude married minors from coverage under compulsory attendance laws.[19] Thus it appears that, regardless of the reasons justifying such decisions, married minors within the statutory ages are not subject to compulsory attendance laws.

### Attendance Restrictions Based on Marriage

The seriousness of the restriction imposed upon married students is a major consideration in testing its validity. Several courts have struck down rules because of their sweeping effect of restricting all married students by an advance determination.[20] Few districts completely and finally expel students because of their marital status as in *McLeod v. State ex rel. Colmer,*[21] but rules have attempted to exclude students for a period of 3 weeks to a year.[22]

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[15]210 La. 389, 27 So. 2d 173 (1946).

[16]*Id.*, 27 So. 2d at 174.

[17]214 La. 1062, 39 So. 2d 731 (1949).

[18]*In re* Rogers, 36 Misc. 2d 680, 234 N.Y.S.2d 172 (Fam. Ct. Shuyler County 1962).

[19]*See, e.g.*, Fla. Stat. § 232.01 (Supp. 1972); Ohio Rev. Code § 3321.01 *et seq.* (1972).

[20]Board of Educ. of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. App. 1964); Anderson v. Canyon Indep. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967).

[21]154 Miss. 468, 122 So. 737 (1929).

[22]In addition there are rules which attempt to separate married students into special groups such as adult education programs. *See* note 9 *supra.*

In *Carrollton-Farmers Branch Independent School District v. Knight,*[23] a husband and wife were suspended from school under a rule requiring a 3-week suspension period for newly married students. In ruling for the students, a Texas appeals court held that "marriage alone is not a proper ground for a school district to suspend a student"[24] and that "[*i*]*f a student is entitled to admission, the question of the length of exclusion is not material.*"[25] This decision was also bolstered by an opinion of the Attorney General of Texas.[26]

In *State ex rel. Thompson v. Marion County Board of Education,*[27] the rule in question required expulsion for the remainder of the term in which the student was married or, if the marriage occurs during the summer, expulsion for the next succeeding term. The dispute involved a girl who was married in February and was to graduate in May. The Tennessee Supreme Court held that the rule had a reasonable relation to proper operation of the school and affirmed the rule because of the following justification by the school board:

> [C]onfusion, disorder, etc., caused by student marriages "mostly occur immediately after the marriage and during the period of readjustment, and the influence of married students on the other students is also greatest at this time."[28]

This case distinguished *McLeod* on the basis of the permanence of its effect. It appears to assert that the length of exclusion is important.

A Texas case, *Anderson v. Canyon Independent School District,*[29] also involved a rule requiring a student to drop out for the rest of the school year in which she was married. The court, in striking down the rule, criticized its "sweeping effect of denying every married student, regardless of the facts or circumstances, at least a portion of a year's education."[30]

*Board of Education of Harrodsburg v. Bentley,*[31] a Kentucky case, struck down as arbitrary and unreasonable a rule requiring students to withdraw for a year following their marriage. The school board tried to justify their rule by claiming that the period of suspension was potentially the most disruptive. The inconsistency of that policy was made

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[23] 418 S.W.2d 535 (Tex. Civ. App. 1967).

[24] *Id.* at 542.

[25] *Id.* (emphasis by court).

[26] *Id.* at 536, citing OP. ATT'Y GEN. OF TEX. No. 0–4965 (Dec. 3, 1942).

[27] 202 Tenn. 29, 302 S.W.2d 57 (1957).

[28] *Id.*, 302 S.W.2d at 58.

[29] 412 S.W.2d 387 (Tex. Civ. App. 1967).

[30] *Id.* at 391.

[31] 383 S.W.2d 677 (Ky. App. 1964).

apparent by the practice of the school to allow the student to remain in school for a maximum of 6 weeks following the marriage. Another major objection voiced by the Kentucky court was the rule's "sweeping, advance determination"[32] of the rights of the married student.

In an Ohio case, *State ex rel. Idle v. Chamberlain,*[33] the court ruled that it was clearly against the public policy of Ohio to exclude a student from attendance because of marriage.[34]

School boards have generally centered their exclusion of married students on two main grounds: (1) that married students are an unhealthy moral influence on their less experienced peers; and (2) that student marriages increase the dropout rate.

The unhealthy moral influence argument was discontinued in the *McLeod* case in 1929, a time of strict moral standards.[35] If students do create a problem through their bad influence on their peers or other disciplinary problems,[36] the problem can be dealt with on an individual basis rather than condemning all members of the group.

There is a great deal of doubt whether marriage adds significantly enough to the dropout problem to justify exclusion of married students.[37] Teenage marriage may be merely a symptom of the disease that causes dropouts and not the disease itself.

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[32]*Id.* at 680.

[33]390 Ohio 2d 262, 175 N.E.2d 539 (C.P. 1961).

[34]*Id.*, 175 N.E. at 541.

[35]McLeod v. State *ex rel.* Colmer, 154 Miss. 468, 122 So. 737 (1929), viewed the marriage relationship as a potential benefit to the school environment, rather than a detriment.

[36]When asked concerning problems created by married students in his district, one County Superintendent of Education in Mississippi gave the following response:

> Unless it is made clear to the married student at the time of enrollment these problems have been experienced:
>
> (a) Do not feel they have to obey rules required of other students, such as the no smoking rule or leaving campus without permission, etc.
>
> (b) Huband becomes a problem if his wife is a student.
>
> (c) Parents of single student sometimes complain.

Letter from W.S. Carter to John P. Price, October 12, 1972.

[37]In the school year 1970-71 there were a total of 18,766 students who dropped out of schools in the state of Mississippi. Of this number 987 listed marriage as their reason for leaving school and 682 gave pregnancy as a reason. In contrast to these figures, 820 listed employment as their reason for leaving school; 1,057 listed parental influence; and 3,176 said they disliked school experiences. Miss. State Dep't of Educ., School Dropouts By Reason 1970-71, at 193 (1971). Even though the validity of these expressed reasons may be questioned, they would seem to indicate that marriages and pregnancies do not disproportionately contribute to the problem of school dropouts in Mississippi.

### Restrictions on Mothers

The alarm caused by student marriages is accentuated by pregnancy. Restrictions on attendance of pregnant girls, whether married or unmarried, must also be based on valid considerations, not unfounded speculation.[38]

Litigation concerning restrictions on student mothers began in 1929, the same year as litigation over exclusion of married students. In *Nutt v. Board of Education*[39] the student had conceived a child out of wedlock, but was married when the child was born. The court held for the student and stated that students could be excluded only if their conduct constituted "physical malady or moral obloquy."[40]

In *State ex rel. Idle v. Chamberlain*[41] a married girl was denied admission to high school because of pregnancy. In upholding the validity of this regulation, the court weighed the desirability of school attendance against physical factors. It placed heavy emphasis on the physical well-being of the student and found that punishment was not the motivation for the rule.[42] An opinion of the Ohio Attorney General favoring admission until the latter stages of pregnancy was

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[38]The policy of the Meridian, Mississippi, public schools stipulates: "For the safety of the pregnant student, she is encouraged to drop out of school at the fifth month and not return until the baby is at least six weeks old." Letter from Douglas Everett to John P. Price, October 16, 1972.

The regulations of the Jackson, Mississippi public schools provide, in part:

> An unwed mother, upon application for admission to school, may be admitted at the beginning of the school year, or not later than six weeks after the beginning of the school year.
>
> . . . .
>
> A pregnant pupil shall be dropped from attendance when such condition is verified by the pupil, her parent or legal guardian, medical examination, or when, in the opinion of the principal, the continued attendance of the pupil is not in the best interest of the school program.

Letter from Curtis G. Summerlin to John P. Price, October 9, 1972.

The Jackson policy also provides for readmission if the pupil has not been absent for more than 60 days or has been enrolled in the Teen Pregnancy Center and has health certification from a doctor. It further provides:

> If, in the opinion of the principal, presence in the school, of any unwed mother or married pupil following pregnancy, would disturb or interfere with the educational process or program of other pupils the pupil may be denied admission. In case admission is denied the pupil, she, her parent or legal guardian, may request in writing a hearing before the School Admission Appeals Committee.

[39]278 P. 1065 (Kan. 1929).

[40]*Id.* at 1066.

[41]390 Ohio 2d 262, 175 N.E.2d 539 (C.P. 1961).

[42]*Id.*, 175 N.E.2d at 541.

emphasized by the court.[43] The court held that the rule requiring withdrawal of pregnant students was not unreasonable nor an abuse of discretion, especially since students were allowed to receive full credit through home study courses.[44]

Apparently the most recent decision involving exclusion of a married mother was in Texas.[45] In this case the court relied heavily upon a Texas statute making public education available to everyone between the ages of 6 and 21.[46] The student was readmitted.

Two cases involving exclusion of unwed mothers by Mississippi school districts were recently litigated in federal district court. In 1969 the Grenada school system attempted to prevent the attendance of unwed mothers. In *Perry v. Grenada Municipal Separate School District*[47] the United States District Court for the Northern District of Mississippi decided that lack of good moral character is sufficient reason to exclude a student but that simply being an unwed mother was insufficient.[48] The court held that such exclusion is a violation of the equal protection clause of the 14th amendment[49] and that the school district must take adequate and reasonable steps to determine the moral character of a girl before she is readmitted to school.[50]

In 1972 the Columbus, Mississippi school district was involved in similar litigation.[51] The federal district court once again found an infringement on equal protection and held that "students may not be excluded from the schools of a school district for the sole reason that they are unwed mothers."[52]

Under these most recent rulings, the school district must supply the student with written specifications of the charges constituting moral

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[43]*Id.* citing OP. ATT'Y GEN. OF OHIO No. 2147 (April 27, 1961), which viewed regulations prohibiting attendance of married or pregnant students under 18 as contrary to public policy.

[44]390 Ohio 2d 262, 175 N.E.2d 539 (C.P. 1961).

[45]Alvin Indep. School Dist. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966), involved a 16-year-old girl who was excluded because of a rule which forbids admission of a married mother.

[46]TEX. REV. CIV. STAT. art. 2904a (1965). This statute was repealed in 1969.

[47]300 F. Supp. 748 (N.D. Miss. 1969).

[48]*Id.* at 753.

[49]*Id.* at 751-53.

[50]*Id.* at 753.

[51]Shull v. Columbus Mun. Sep. School Dist., 338 F. Supp. 1376 (N.D. Miss. 1972).

[52]*Id.* at 1377-78. *See* Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971), which ordered readmission of an 18-year-old unmarried, pregnant student and placed the burden of justifying exclusion in such cases on the school board.

unfitness[53] and cannot continue to exclude the student without a hearing on the charges.[54]

### Limitations of Extracurricular Activities

The most recent battles in the struggle over rights of married students have centered on the question of participation in extracurricular activities.[55] A long line of cases, beginning in 1959 and continuing throughout the sixties,[56] have upheld regulations by school boards and athletic associations which restrict activities of married students. In ruling on these regulations, the courts have once again expressed their reluctance to interfere with the discretion of school boards as long as they are not arbitrary.[57] Rules by athletic associations setting reasonable restrictions on right of participation have also been upheld.[58]

In restricting extracurricular activities schools have sought to establish a right-privilege distinction. This justification was thus stated by one school board:

> We have no disagreement with the proposition advocated that all students attending school should be accorded equal privileges and advantages. But the participation in extracurricular activities must necessarily be subject to regulations as to eligibility. Engaging in them is a privilege which may be claimed only in accordance with the standards set up for participation. It is conceded, as the plaintiff insists, that he has a constitutional

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[53]*Id.* at 1377.

[54]Perry v. Grenada Mun. Sep. School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969).

[55]One school district included the following as extracurricular activities covered by their rule: (1) leadership in school organizations or activities; (2) athletic activities; (3) scholarship activities; (4) member of band and glee club; (5) social events; (6) dramatic events and musical activities; (7) cheerleader; (8) school sponsored trips. State *ex rel.* Baker v. Stevenson, 27 Ohio 2d 223, 189 N.E.2d 181, 183 (C.P. 1962).

[56]Board of Dir. of Indep. School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Estay v. Lafourche Parish School Bd., 230 So. 2d 443 (La. App. 1969); Cochrane v. Board of Educ. of Messick Consol. School Dist., 360 Mich. 390, 103 N.W.2d 569 (1960); State *ex rel.* Baker v. Stevenson, 27 Ohio 2d 223, 189 N.E.2d 181 (C.P. 1962); Kissick v. Garland Indep. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959); Starkey v. Board of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P.2d 718 (1963).

[57]*See, e.g.,* Marino v. Waters, 220 So. 2d 802 (La. App. 1969); State *ex rel.* Baker v. Stevenson, 27 Ohio 2d 223, 189 N.E.2d 181 (C.P. 1962); Starkey v. Board of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P.2d 718 (1963).

[58]*See, e.g.,* Scott v. Kilpatrick, 286 Ala. 129, 237 So. 2d 652 (1970); State *ex rel.* Indiana High School Ath. Ass'n v. Lawrence Cir. Ct., 240 Ind. 114, 162 N.E.2d 250 (1959); Marino v. Waters, 220 So. 2d 802 (La. App. 1969).

> right both to attend school and to get married. But he has no "right" to compel the Board of Education to exercise its discretion to his personal advantage so he can participate in the named activities.[59]

The United States Court of Appeals for the Fifth Circuit recently ruled that the "privilege of participation in interscholastic activities" was not protected by due process but was left to state protection.[60]

Schools have offered a variety of very inventive rationales for their restrictions. One school board offered the following as policy justifications of their rule:

> 1. Married students assume new and serious responsibilities. Participation in extracurricular activities tends to interfere with discharging these responsibilities.
> 2. A basic education program is even more essential for married students. Therefore, full attention should be given to the school program in order that such students may achieve success.
> 3. Teenage marriages are on the increase. Marriage prior to the age set by law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages.
> 4. Married students need to spend time with their families in order that the marriage will have a better chance of being successful.
> 5. Married students are more likely to drop out of school. Hence, marriage should be discouraged among teenage students.
> 6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities.
> 7. The personal relationships of married students are different from those of non-married students. Non-married students can be unduly influenced as a result of relationships with married students.
> 8. Married students may create school moral and disciplinary problems, particularly in the informal extracurricular activities where supervision is more difficult.[61]

In addition to these justifications is the proposition that if the married student is allowed to participate in sports, he may attain a "hero"

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[59]Starkey v. Board of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P.2d 718, 721 (1963). Marino v. Waters, 220 So. 2d 802, 806 (La. App. 1969), also views participation in extracurricular activities as a "privilege," not a "property right."

[60]Mitchell v. Louisiana High School Ath. Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970).

[61]Board of Dir. of Indep. School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).

status which will then be associated with his marital status by his impressionable peers.[62]

A more liberal trend in the case law recently emerged in *Wellsand v. Valparaiso Community Schools Corp.*,[63] a federal district court case from the Northern District of Indiana. This controversy involved a rule of an athletic association which prevented the plaintiff, a married high school student, from playing football. The court refused to hold that the right to participate in interscholastic athletics was constitutionally protected,[64] but held that even if the right was not of constitutional stature, its deprivation might constitute a denial of equal protection.[65]

The court held that the action of the athletic association constituted state action because of the association's use of state supported facilities and its composition of state schools.[66]

For their rule, the association proposed a variety of justifications such as those mentioned above. None of these, in the opinion of the court, satisfied the "rational basis" test of equal protection.[67] The court thus found a violation of equal protection and issued an injunction against the athletic association to prevent exclusion of the plaintiff from activities because of his marital status.[68]

This more liberal approach has been followed by several other courts in the past year. In *Holt v. Shelton*[69] a federal district court in Tennessee applied the "compelling state interest" test to exclusion of married students from extracurricular activities and found a violation of both equal protection and due process.[70] The court stated that any infringement on the fundamental right to marry is subject to close judicial scrutiny.[71]

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[62]State *ex rel.* Baker v. Stevenson, 27 Ohio 2d 223, 189 N.E.2d 181, 185 (C.P. 1962).

[63]No. 71 H 122 (2) (N.D. Ind., Sept. 1, 1971). For an excellent discussion of this case and the surrounding issues *see* Note, 47 IND. L.J. 378 (1972).

[64]*Id.* at 2.

[65]*Id.* at 3.

[66]*Id.* at 4-6.

[67]*Id.* at 6. The "rational basis" test is not as strict as the "compelling state interest" test. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); McGowan v. Maryland, 366 U.S. 420 (1961). *See also* Comment, *Equal Municipal Services for the Other Side of the Tracks*, 43 MISS. L.J. 67 (1972), for an excellent discussion of equal protection standards and their application. The court held that it was not necessary to decide which standard applied in this case since not even the "rational basis" standard was met.

[68]No. 71 H 122 (2) (N.D. Ind., Sept. 1, 1971), at 13.

[69]341 F. Supp. 821 (M.D. Tenn. 1972).

[70]*Id.* at 823.

[71]*Id.*

In *Davis v. Meek*,[72] a federal district court case from Ohio, the court viewed the problem as an invasion of martial privacy.[73] In its opinion the court offered the following criticism of such rules:

> What the rule does, as distinguished from what it is intended to do, is to punish the one who has not been deterred at all even by the immediate prospect of the punishment, much less by the example it is supposed to offer.[74]

## Conclusion

To limit or deny any person access to our public schools is a serious matter. This is especially true in this day of specialized knowledge and skills in which a high school diploma is almost essential to obtaining a good job.[75] In order to justify restrictions on attendance or full participation by married students, schools should be required to show a compelling educational interest.

It is clear that a school may no longer restrict the attendance of a student simply because of marriage. The courts have refused to accept the cries of alarm of school administrators and have adopted the attitude of the Mississippi Supreme Court in the *McLeod* case of 1929.

School districts must have a strong justification for exclusions because of pregnancy. It is reasonable for the school to restrict attendance of the student when, and if, her presence constitutes a danger to her health. Allegations of bad moral character must be positively proven by the district. This is true even in the case of unwed mothers.

The right to restrict the extracurricular activities of married students is still a live controversy. Although the more recent liberal trend has been against such restrictions, validity of regulations of this nature depends largely upon the jurisdiction in which they are applied. It is

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[72]344 F. Supp. 298 (N.D. Ohio 1972).

[73]*Id.* at 302. The court based its decision on the fundamental right of marital privacy recognized by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965).

[74]344 F. Supp. at 302.

[75]In Board of Educ. of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. App. 1964), the court recognized this issue:

> For the appellee it is pointed out that all persons meeting the residence, moral and mental qualifications are entitled to an opportunity for publicly furnished education until attaining age twenty-one. In today's economy we judicially notice the increasing demand for education as a prerequisite for employment. Certainly, there is no reason to suppose that the marriage of a student will diminish the need of that student for an education — indeed, just the contrary would appear the case.

*Id.* at 680.

apparent from the right-privilege distinction which has been established that the right of participation in extracurricular activities will not soon be considered on the same fundamental level of importance as the right of attendance.

Any proper regulation must respect both the fundamental rights of students and the necessities of successful educational administration. The following standard recognizes both of these factors and is suggested as a model:

> The right to an education provided for all students by law should not be abrogated for a particular student because of marriage or pregnancy unless there is compelling evidence that his or her presence in the classroom or school does, in fact, disrupt or impair the educational process for other students. This includes the right to participate in all activities of the school. If temporary or permanent separation from the school should be warranted, the education provided elsewhere should be qualitatively and quantitatively equivalent to that of the regular school, so far as is practicable.[76]

*John P. Price*

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[76]AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 20 (1968).

# THE MISSISSIPPI CONDOMINIUM ACT: AN ANALYSIS OF POTENTIAL PROBLEMS

## Introduction

Multiple occupancy of an undivided parcel of land is a concept that has existed in actual practice and in law throughout history. At common law, four basic forms of multiple occupancy were recognized: (1) the lease, (2) the tenancy in common, (3) the stock cooperative and (4) horizontal or stratified ownership of land.[1] Although each of these common law forms of multiple occupancy has been used, each is inherently disadvantageous to the occupant. The lease has been the favorite of these common law devices and has received the most widespread use.[2] Under the leasehold, however, the tenant builds no equity in the property and acquires no interest in the property after the lease has expired. In addition, the tenant has little or no control over other portions of the property, even though his rental payments are usually somewhat higher than mortgage payments would be if he were buying the property.[3]

The tenancy in common is disadvantageous because there is no specific portion of the property over which the individual owner has sole and exclusive control or to which he has a sole and exclusive right of possession. Instead, each owner has a right of occupancy in the whole premises with his co-owners. In addition, any individual owner may, at any time, demand partition and thus disrupt the entire project. Under the concept of the stock cooperative, a corporation owns the entire building.[4] The occupants of the building, who hold proprietary leases, own all of the stock in the corporation.[5] The disadvantages inherent in the stock cooperative are obvious. The maintenance and

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[1]Legislative Comment, *Alabama Apartment Ownership Act — A Condominium Law Introduction,* 17 Ala. L. Rev. 375 (1965) [hereinafter cited as *Condominium Law Introduction*].

[2]*Id.*

[3]The tenant, like the owner of a condominium unit or other owner in fee, must pay a proportionate share for the amortization of the purchase price of the property plus a proportionate share of the operating expenses. The tenant, however, also pays an additional amount of approximately 10 percent for the landlord's profit. *See* Seeber, *Condominiums in North Carolina: Improving the Statutory Base,* 7 Wake Forest L. Rev. 355, 356 (1971) [hereinafter cited as Seeber].

[4]*Condominium Law Introduction, supra* note 1, at 376.

[5]N. Penney & R. Broude, Cases and Materials on Land Financing 114 (1970) [hereinafter cited as Penney & Broude].

repair expenses, taxes, mortgage payments and the like fall upon the corporation. If one owner defaults in the payment of his share, the financial burden of that owner then falls to his co-owners.[6] The common law recognition of horizontal or stratified ownership of land, which allows fee ownership of airspace above the ground, has had as its primary drawback the absence of uniform laws among state jurisdictions with regard to this form of ownership.[7] Even in those jurisdictions which recognize this form of ownership, legal provisions for resolving such problems as apportionment of common expenses and adjustment of the rights of individual owners upon destruction of the building are inadequate.[8] The practical result of the confusion in the common law forms of fee ownership was that mortgage lenders were unwilling to finance the purchase of individual apartments within a larger structure.[9] The shortcomings inherent in these forms of ownership have been cured, to a large extent, by passage of condominium enabling legislation.[10]

## Evolution of the Condominium

The condominium is an ancient form of ownership. Some authors state that condominiums[11] have existed since Biblical times,[12] while others state that they first existed in Roman law.[13] Nevertheless, it is

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[6]*See, e.g., id.* at 116; *Condominium Law Introduction, supra* note 1, at 376; 13 De Paul L. Rev. 117, 118 (1963).

[7]*See* Note, *Real Property—Georgia's Apartment Ownership Act—Its Scope Analyzed in View of Emerging Condominium Litigation in Other Jurisdictions*, 23 Mercer L. Rev. 405 (1972) [hereinafter cited as *Georgia's Apartment Ownership Act*], in which the author states:

> Although some authorities feel that under the common law of most jurisdictions there is no legal barrier . . . to creation of separate ownership in adequately described areas of space above the surface of the earth, it is felt that comprehensive statutes will prevent the *reluctance of some courts to recognize condominium ownership.*

*Id.* at 406 (emphasis added).

[8]*Condominium Law Introduction, supra* note 1, at 376-77.

[9]*Id.* at 377.

[10]13 De Paul L. Rev. 117, 118 (1963). "[T]he advantage of legislation lies in the fact that it organizes the field of law and eliminates uncertainty as to what the law is." *Id.*

[11]Although "condominia" is the technically correct plural form, the majority of writers and a number of statutes have made "condominiums" the approved plural form. 15 Am. Jur. 2d *Condominiums and Co-operative Apartments* § 1 (1964).

[12]*See, e.g.*, 25 Vand. L. Rev. 271, 272 (1972), in which the author states that condominiums existed as long ago as 500 B.C.

[13]*See, e.g., Georgia's Apartment Ownership Act, supra* note 7, at 405.

generally agreed that condominiums have been in existence in Europe since the Middle Ages.[14] This concept of property ownership spread from Europe to Latin America and thence to the United States by way of Puerto Rico.[15] Whatever its true origin, the first appearance of the condominium concept in the United States was in the "Horizontal Property Act,"[16] which was enacted in Puerto Rico in 1951.[17] Congress recognized the benefits inherent in the condominium form of property ownership[18] and amended the "National Housing Act" in 1961[19] to permit the Federal Housing Administration (F.H.A.) to insure mortgages on individually owned units in multi-unit structures[20] where such form of ownership has been established by the laws of the state in which the property is located.[21] Subsequent to this amendment, the F.H.A. drafted the "Model Statute for Creation of Apartment Ownership"[22] (F.H.A. Model Act). The F.H.A. Model Act and the Puerto Rican act greatly influenced the legislation which was drafted and enacted by the individual states.[23] Passage of condominium enabling legislation by the states was rapid. All 50 states and the District of Columbia have now enacted such legislation.[24]

## Analysis of the Mississippi Condominium Act

### *A. Terminology*

In 1964 the Mississippi legislature passed the "Mississippi Condominium Act"[25] (hereinafter referred to as the Act). The stated purpose of the Act is to "give statutory recognition to the condominium form of real property."[26] A comparison of the Mississippi Act with those acts passed by the other 49 states is beyond the scope of this

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[14]15 Am. Jur. 2d *Condominiums and Co-operative Apartments* § 3 (1964).

[15]Seeber, *supra* note 3, at 356.

[16]31 P. R. Laws Ann. tit. 31, §§ 1291-93k (Supp. 1971).

[17]*See, e.g., Condominium Law Introduction, supra* note 1, at 378; *Georgia's Apartment Ownership Act, supra* note 7, at 405.

[18]*See, e.g.,* Comment, *Condominium: An Introduction to the Horizontal Property System,* 11 De Paul L. Rev. 319, 326 (1962) [hereinafter cited as *Introduction to the Horizontal Property System*].

[19]Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149.

[20]" 'Multi-family project' means a project containing four or more family units." 24 C.F.R. § 234.1 (k) (1972).

[21]Housing Act of 1961, Pub. L. No. 87-70, § 104, 75 Stat. 149.

[22]F.H.A. Form No. 3285, *appearing in* Penney & Broude, *supra* note 5, at 140.

[23]*See, e.g.,* Seeber, *supra* note 3, at 356.

[24]*Id.* at 355.

[25]Miss. Code Ann. §§ 896-01 to -21 (Supp. 1972).

[26]*Id.* § 896-02.

discussion; instead, the practical operation and a few of the potential problems which may be encountered under the Act will be discussed.

Since the Act recognizes or creates a new form of ownership of real property in this state, it must also recognize or create new terminology to define such ownership. Thus it is imperative to understand certain basic terms which are defined by and used throughout the Act. The first new term used in the Act is, of course, "condominium." It is defined as follows:

> "Condominium" means that form of ownership of condominium property under which units of improvements are subject to ownership by different owners and there is appurtenant to each unit as part thereof an undivided share in the common areas.[27]

Although this definition is somewhat ambiguous, "condominium" is defined with greater specificity in a subsequent section of the Act, as follows:

> A condominium is an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential,[28] industrial, or commercial[29] building on such real property, such as an apartment, office, or store. A condominium may include in addition a separate interest in other portions of such real property.
>
> Such estate may, with respect to the duration of its enjoyment, be in fee simple, leasehold or any other estate in real property recognized by law.[30]

When these two sections are read together, it is apparent that the Act clearly and concisely defines the condominium concept of ownership. Nothing more need be said about the statutory definition, except that the expressed inclusion of commercial and industrial property within the condominium concept provides Mississippi developers a greater degree of certainty in utilizing the condominium in the area of commercial development.[31]

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[27]*Id.* § 896-03A.

[28]Only condominiums which consist of dwelling units are eligible for F.H.A. mortgage insurance. *See* Housing Act of 1961, Pub. L. No. 87-70, § 104, 75 Stat. 149.

[29]Many commentators predict that the condominium will have its greatest growth in the area of commercial development. Reskin, *Overview and Comparison with Cooperatives* in PRACTISING LAW INSTITUTE, COOPERATIVES AND CONDOMINIUMS 219, 228 (4 Real Estate Transcript Series, 1969) [hereinafter cited as Reskin].

[30]MISS. CODE ANN. § 896-04 (Supp. 1972).

[31]Although there is no statutory prohibition against the use of the condominium for commercial development in other states, the draftsmen of most condominium acts,

Under the definition of "condominium," an owner has individual title to a "unit" and an undivided interest as a tenant in common in the "common areas." The Act defines "unit" as "the elements of a condominium which are not owned in common with the owners of other condominiums in the project."[32] Unless the deeds, declaration of restrictions or plans expressly provide otherwise[33] "[t]he boundaries of the unit . . . are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the unit includes both the portions of the building so described and the airspace so encompassed."[34] A "common area" is defined as the entire project[35] "excepting all units therein granted or reserved."[36] It is further provided that absent an express contrary provision "[t]he common areas are owned by the owners of the units as tenants in common, in equal shares, one for each unit."[37]

Although the foregoing definitions clearly define the interest held by each condominium owner, the statutory language allows the project developer and his attorney to exercise a limited degree of discretion in altering the definition of such ownership. The developer and his attorney can eliminate potential problems by carefully considering the alternatives available to them and exercising the discretion allowed by the Act in defining the interest which each individual purchaser is to hold in the project.

The Act provides that a unit includes both those portions of the building described in the Act *and the airspace so encompassed,* "[u]nless otherwise expressly provided in the deeds, declaration of restrictions or plan. . . ."[38] If this provision remains unchanged by the deed or declaration of restrictions, each unit owner would have fee title to a prescribed volume of airspace above the ground in the event the building or unit is subsequently destroyed. If the owners should decide

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as well as many legal authors, seem preoccupied with the residential aspects of the condominium. This is due, perhaps, to the great influence of the F.H.A. Model Act. *See, e.g.,* 13 De Paul L. Rev. 117 (1963), which states:

> In its modern legal sense, condominium means ownership in fee simple of a *one-family unit in a multi-family structure,* coupled with ownership of an undivided interest in the land and all other parts of the structure as a tenant in common with the other unit owners.

*Id.* at 118 (emphasis added).

[32]Miss. Code Ann. § 896-03B (Supp. 1972).

[33]*Id.* § 896-07.

[34]*Id.* § 896-07A.

[35]The project is the "entire parcel of real property divided, or to be divided into condominiums, including all structures thereon." *Id.* § 896-03C.

[36]*Id.* § 896-03D.

[37]*Id.* § 896-07B.

[38]*Id.* § 896-07A.

to rebuild the unit or building, rather than terminate the project by partition,[39] they would be shackled by the original building plans, because the new building would have to be constructed to envelop the same volume of airspace which each unit owner had previously owned in the old building. Thus, the owners of condominiums would be unable to avail themselves of modern architectural and technological advances.[40] It can also be argued that the conveyance of the airspace within the unit is unnecessary, so long as all of the unit owners hold individual fee title only to the interior surfaces of the perimeter walls, floors, ceilings, windows, and doors of their respective units. If the building is destroyed or partially destroyed and the owners decide to partition the project, the Act provides that the entire project shall be sold "as though the owners of all of the condominiums in such project were tenants in common in the entire project in the same proportion as their interests in the common areas."[41] There would, therefore, be no advantage to unit owners whose units were undamaged or damaged to a lesser degree, nor would there be any disadvantage to those owners whose units were totally destroyed. On the other hand, if the owners decided to repair or rebuild the building, they could avail themselves of any architectural and technical innovations which they desire. Therefore, the better practice would be to describe the unit in the deed and in the declaration of restrictions as including the interior surfaces of the perimeter walls, floors, ceilings, windows, and doors, and to expressly exclude the airspace so encompassed. It should be noted, however, that although the language contained in section 896-07 of the Act clearly authorizes this suggested alteration in the definition of a unit, section 896-04 of the Act may be interpreted to preclude such alteration. This conflict is one which could easily be resolved by amending section 896-04 to allow the same discretion in defining the condominium unit as that allowed in section 896-07.

Another potential problem inherent in the definitions discussed above arises because the common areas are to be owned by the unit owners in equal shares, one share for each unit.[42] The share in the common areas which is owned by each individual owner is important for three reasons. First, each owner's proportionate share in the common areas determines what his share will be in the common expenses and liens against the project.[43] Second, each owner's proportionate

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[39]*See id.* § 896-18.

[40]Seeber, *supra* note 3, at 360.

[41]MISS. CODE ANN. § 896-18 (Supp. 1972).

[42]*Id.* § 896-07B.

[43]The declaration of restrictions may provide "[f]or reasonable assessments to

share in the common areas will determine the weight to be given his vote in the management of the project and in determining whether to restore or partition the project in the event of partial or total destruction or in the event the project remains in existence for 50 years and is deemed to be obsolete and uneconomic.[44] Finally, if an action for partition is brought and the entire project is sold, the owners will share in the proceeds in the same proportion as their interests in the common areas.[45] The problems to be anticipated are obvious. "[T]he owner of the least expensive unit in the project must pay a higher percentage of his unit's value for common expenses than [does] the owner of the most expensive unit."[46] Conversely, the owner of the most expensive unit in the project has no more influence in determining the affairs of the project than does the owner of the latest expensive unit, even though the former's investment may be substantially higher.[47] It has been suggested by one commentator that both of these results seem unreasonable.[48] An even more unreasonable result occurs when an action for partion is brought under section 896-18.[49] If this occurs, the owner of the least expensive unit in the project will receive the same amount from the proceeds as will the owner of the most expensive unit in the project, even though the former may have substantially less invested in his condominium. For these reasons, it would seem wiser to apportion the ownership in the common areas to correspond with the fractional proportion of the sale price of each unit to the total sale price of all of the units at the time of the initial sale[50] or with the fractional proportion of the floor area of each unit to the total floor area of all of the units.[51] Either of these methods of allocating interest in the common areas may be used under the Act, but must be expressly set forth in the deeds, declaration of restrictions or plan.[52] It would be wise to expressly set forth the method decided upon in all three documents.

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meet authorized expenditures of any management body . . . each condominium to be assessed separately for its share of such expenses in proportion, unless otherwise provided, to its owner's fractional interest in any common areas." *Id.* § 896-09E.

[44]*See id.* § 896-18.

[45]*See id.*

[46]13 DE PAUL L. REV. 111, 114 (1963).

[47]*Id.*

[48]*Id.*

[49]MISS. CODE ANN. § 896-18 (Supp. 1972).

[50]*See, e.g.*, F.H.A. Form No. 3285, *Model Statute for Creation of Apartment Ownership* § 6(a), *appearing in* PENNEY & BROUDE, *supra* note 4, at 140.

[51]*See* 15 AM. JUR. 2d *Condominiums and Co-operative Apartments* § 8 (1964).

[52]MISS. CODE ANN. § 896-07 (Supp. 1971).

### *B. Submitting Property to the Provisions of The Act*

A plan of the condominium project must be recorded in the office of the chancery clerk in the county in which the condominium property is located before the provisions of the Act will apply to any property to be divided into condominiums.[53] The plan must contain a description or survey map of the surface of the land included within the project, diagrammatic floor plans of the project sufficient to identify each unit together with its relative location and approximate dimensions, and a certificate consenting to the recordation of the plan signed and acknowledged by the record owner[54] of the real property and the record holders of security interests in such property.[55] Once this provision has been met, the property is formally submitted to the provisions of the Act.

After the property has been formally submitted to the provisions of the Act by the recordation of the plan, one further step is necessary before any condominium in the project may be conveyed. A declaration of restrictions must be recorded by the owner of the project.[56] Drafting the restrictions to be contained in the declaration is perhaps the most important step in setting up a condominium. The restrictions must define the duties and obligations of each owner, for friction may often arise due to the close proximity in which the owners must live and because of the interdependence among the owners in the maintenance and operation of the common areas.[57] Section 896-09 of the Act sets forth provisions which may be included in the declaration to provide management for the project and to provide the powers needed by the managing body to run the project on a day-to-day basis. These recommended provisions are set forth clearly and concisely and must be incorporated into the declaration or altered by the draftsman after considering the facts pertaining to each individual condominium project. These statutory provisions, therefore, will not be discussed further. The following discussion will highlight potential problems which must be considered by the draftsman and for which there are no provisions under section 896-09 or other sections of the Act.

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[53] *Id.* § 896-05.

[54] "The term 'record owner' . . . includes all of the record owners of such real property at the time of recordation, but does not include holders of security interests, mineral or royalty interests, easements or rights of way." *Id.*

[55] *See id.*, which also provides that after the plan is recorded, the provisions of the Act shall continue to apply to the property until a revocation is recorded.

[56] *Id.* § 896-09. This section further provides that the restrictions recorded in the declaration are enforceable equitable servitudes which shall bind all owners and which may be enforced by any owner of a condominium in the project.

[57] *See Condominium Law Introduction, supra* note 1, at 383.

### *C. Right of First Refusal*

The proximity in which condominium owners must live and their interdependence upon each other require that they be able to exercise some degree of selectivity in choosing their neighbors if harmony is to be maintained.[58] It is suggested by many commentators that this selectivity be insured by the inclusion of a right of first refusal in the declaration of restrictions.[59] However, as the following discussion will illustrate, the right of first refusal will, under the laws of many jurisdictions, offer little or no insurance that condominium owners will be granted the degree of selectivity which they may desire.

A right of first refusal, which is also known as a pre-emptive option, gives the holder of the right an option to purchase certain property if, and only if, the owner of the property desires to sell it.[60] The right of first refusal, as used in condominium projects, should give to the Unit Owners' Association, or other similar organization of unit owners, the right to purchase the interest of any individual owner who desires to dispose of his interest in the project.[61] Although the right of first refusal cannot be exercised to prevent a unit owner from disposing of his interest in the project by devise or outright gift, the inclusion of a standard "successors in interest" clause will insure that the option will be binding upon a devisee or donee who may acquire the interest.[62] There should also be included in the right of first refusal an express provision stating a definite and reasonable period of time, such as 30 days or 60 days, during which the Unit Owners' Association may exercise the option by "meeting" the best offer which the individual owner has received. If, after expiration of the stated time period, the association has not met this price, the owner may sell his interest to the individual who made that offer.[63] A right of first refusal, if drafted as set forth in this paragraph, will not deprive the individual owner of his right to retain or dispose of his interest in the project, nor will it affect his ability to receive fair market value for the condominium if he chooses to dispose of it. Also, the other owners will be assured of the desired degree of selec-

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[58]*See, e.g.*, Moller, *The Condominium Confronts The Rule Against Perpetuities*, 10 N.Y.L.F. 377, 383 (1964) [hereinafter cited as Moller].

[59]*See, e.g.*, Rubens, *Right of First Refusal and Waiver of the Right of Judicial Partition*, 14 HASTINGS L.J. 255, 262 (1963) [hereinafter cited as Rubens]; Seeber, *supra* note 3, at 362.

[60]*See* J. DUKEMINIER, PERPETUITIES LAW IN ACTION 128 (1962) [hereinafter cited as DUKEMINIER].

[61]*See* Moller, *supra* note 58, at 377.

[62]Rubens, *supra* note 59, at 258-59.

[63]Seeber, *supra* note 3, at 362-63, *quoting* from the declaration of "201 East Chestnut Condominium," May 21, 1965.

tivity in the choice of their new neighbors. Although the right of first refusal discussed herein operates with equitable results for all condominium owners in the project, there are two possible barriers which may prevent the use of such an option. These barriers are the rule against restraints of alienation and the rule aganist perpetuities.

The rule against restraints on alienation renders invalid only those conveyances in which there are restraints which are considered to be unreasonable. It is generally agreed that a right of first refusal will be deemed to be reasonable and will not violate the rule against restraints on alienation if the Unit Owners' Association has a legitimate reason for seeking to maintain a particular status or type of unit owner, and the right of first refusal is not arbitrarily exercised by the association and it is not systematically used to discriminate against prospective purchasers because of race, creed or national origin.[64]

If the right of first refusal complies with the rule against restraints on alienation, the holder may still have an option to acquire the property at a future time and therefore, violate the rule against perpetuities.[65] The primary purpose of the rule against perpetuities is to prevent the creation of a future interest in property which is contingent and which vests at a time in the distant future, thereby reducing the marketability and present value of the property.[66] The majority of writers agree that a right of first refusal, if unlimited in time, violates the rule against perpetuities.[67] Nevertheless, almost all writers agree, although for varying reasons, that the rule should not be applied to such an option when used within the condominium concept.[68]

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[64]Moller, *supra* note 58, at 389. *Accord,* DUKEMINIER, *supra* note 60, at 130; Reskin, *supra* note 29, at 241; Rubens, *supra* note 59, at 257-58; Seeber, *supra* note 3, at 363-64; 15 AM. JUR. 2d *Condominiums and Co-operative Apartments* § 17 (1964).

[65]Several jurisdictions have enacted legislation which expressly provides that the rule against perpetuities shall not invalidate a right of first refusal contained in any instrument executed under condominium enabling acts. *See, e.g.,* Moller, *supra* note 58, at 389-90; Seeber, *supra* note 3, at 362.

[66]Moller, *supra* note 58, at 378.

[67]*See, e.g.,* DUKEMINIER, *supra* note 60, at 127; Moller, *supra* note 58, at 381; Rubens, *supra* note 59, at 259; 13 DE PAUL L. REV. 111, 116 (1963).

[68]*See, e.g.,* Seeber, *supra* note 3, at 364, in which the author states that the right of first refusal should be upheld in condominium situations, because it is primarily a commercial transaction and is not appropriately subject to the rule. The right of first refusal is also socially desirable because it will prevent conflict and litigation by regulating the affairs of the condominium; Moller, *supra* note 58, at 383, in which the author states that a right of first refusal creates a contract right and not an interest in land; therefore, he submits that the rule, which is a rule of property, should not apply to the right of first refusal. The author also states, at 383, that "[i]f no method is provided whereby the unit owners may screen and select their neighbors to

The Mississippi Act, as it was first enacted, eliminated any problems the right of first refusal might have had with the rule against restraints on alienation and the rule against perpetuities.[69] Ironically these problems were created by an amendment to the Act in 1971.[70] The Act, in its present form, provides that covenants and restrictions prescribing regulations concerning sales or leases of units shall be valid,[71] but it no longer contains the statutory right of first refusal that was contained in the Act as it was first enacted. It is clear from reading the Act in its original form and reading it in its amended form that the legislature did not amend the Act for the purpose of subjecting its provisions and the instruments created thereunder to the rule against restraints on alienation and the rule against perpetuities. Instead, the amendment was enacted to repeal the mandatory right of first refusal and to provide for the discretionary utilization of such option. Section 896-02 states that the Act "shall not be construed as repealing or amending any law now in effect except those in conflict herewith." The question which will have to be answered by the Mississippi courts is whether credence will be given to the intent of the legislature or to the express provisions of the Act. The obvious solution to the problem is another amendment which allows the discretion that exists under the present form of the Act and, at the same time, expressly provides that the rule against restraints on alienation and the rule against perpetuities shall not apply to the provisions of the Act or to any instruments created thereunder.

If the Act is not amended and if the Mississippi courts refuse to resolve the problem by giving credence to the legislative intent, it is difficult to determine what effect, if any, a right of first refusal, unlimited in time, will have upon the alienation of an individual condominium.[72] The Mississippi Supreme Court has been reluctant in recent years to employ a strict application of the rule against perpetuities and has con-

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some extent, the marketability of each unit, and of the condominium as an entity, will, in all likelihood, be seriously impaired." If this statement is correct, it can be argued that the application of the rule would reduce the present value of the property and would, therefore, defeat its primary purpose.

[69]Act of Apr. 9, 1964, ch. 270, § 10, [1964] Gen. Laws Miss. 344. This section sets forth a statutory right of first refusal.

[70]Miss. Code Ann. § 896-10 (Supp. 1972).

[71]*Id.* §§ 896-09, -10.

[72]It is clear that the right of first refusal will be valid and enforceable if it is reasonable and if it is limited to a specified period of time which is within the period allowed by the rule against perpetuities. However, the Unit Owners' Association has a legitimate interest in the project which will probably exceed the period allowed by the rule. The right of first refusal will not be wholly effective or accomplish its purpose unless it is valid and enforceable for the lifetime of the project.

sequently avoided the arbitrary and oftentimes harsh results of the rule.[73] The court first evidenced its reluctance to apply the rule strictly by applying the doctrine of "equitable approximation."[74] The second doctrine used by the court to avoid the harsh results of a strict application of the rule against perpetuities was the "possibilities" doctrine.[75] It has been said that the "possibilities" doctrine referred to by the court is, in reality, a "wait and see" doctrine.[76] The "possibilities" or "wait and see" doctrine appears to be the present state of the law in Mississippi with regard to the rule against perpetuities.

If it is argued that the right of first refusal violates both rules in question, the difficulty in determining the effect, if any, to be given the option is compounded. One authority has suggested that the validity of a right of first refusal in jurisdictions which apply the "wait and see" doctrine will depend upon whether the court decides to apply the rule against perpetuities first or whether it decides to apply the rule against restraints on alienation first.[77] If the latter rule is applied first, a right of first refusal which is unlimited in time may be held to violate that rule and would, therefore, be declared void before the rule against perpetuities is applied. If, however, the rule against perpetuities, as modified by the "wait and see" doctrine, is applied first, the right of first refusal will be deemed to be limited in time to the period prescribed by the rule.[78] When the rule against restraints on alienation is applied, the right of first refusal, no longer unlimited in time, will not be held

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[73]Bradley, Hodge, & Rainey, *1965-66 Mississippi Supreme Court Cases*, 38 MISS. L.J. 1, 21 (1966).

[74]*See* Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962), in which the Mississippi Supreme Court reduced the period of time required for a contingency to occur, as provided in a will, to a period of time which allowed vesting of the interest within the period of the rule against perpetuities. The court stated that this application of the "equitable approximation" doctrine carried out the dominant intent of the testator while still preserving the policy behind the rule.

[75]*See* Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966), in which the court refused to apply the traditional view that the validity of a future interest is determined by the facts that exist at the time of the creation of the instrument. Under that view, if there is any possibility that the rule could be violated, the instrument creating the interest is void. Instead, the court applied the "possibilities" doctrine which renders the instrument valid if the contingency actually occurs within the period prescribed by the rule.

[76]Bradley, Hodge, & Rainey, *supra* note 73, at 21.

[77]DUKEMINIER, *supra* note 60, at 130.

[78]Although the court has not stated how long they will "wait and see" to determine whether an interest is valid, it might be inferred from the decision in Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966), that the court will wait until the expiration of the period prescribed by the rule against perpetuities. 37 MISS. L.J. 487,

to be an unreasonable restraint.[79] The reluctance of the Mississippi court to strictly apply the rule against perpetuities is indicative of its desire to uphold the validity of instruments and to enforce the intentions of the parties thereto. Therefore, the Mississippi Supreme Court will probably apply the rule against perpetuities to a right of first refusal before applying the rule against restraints on alienation. In the absence of an amendment to the Act, the right of first refusal will probably be binding upon the individual condominium owner only for the period of time prescribed by the rule against perpetuities.

*D. Improving, Reconditioning, or Adding to the Condominium Project*

There are no provisions in the Act specifically setting forth the rights and obligations of the individual condominium owners in the event the entire condominium project needs overhauling or reconditioning. Nor are there provisions setting forth such rights and obligations when the owners desire to improve the property or add to the project. The draftsman of the declaration of restrictions must anticipate the problems which will arise and set forth with specificity the duties and obligations of the individual condominium owners to preclude such problems. Although these provisions must be designed to conform to the circumstances pertaining to each individual condominium project, there are certain fundamental considerations which will be applicable to all projects.

The possibility of an extraordinary assessment will understandably concern the individual owners, especially those with fixed incomes and limited resources.[80] On the other hand, it must be anticipated that the project will need a major remodeling or reconditioning or that some owners in the project will desire that the project build swimming pools or clubhouses or purchase facilities such as golf courses or tennis courts. Unless there is a careful balancing of interests, the less affluent condominium owner may be "improved" out of his interest by extraordinary assessments;[81] or, the project as a whole may suffer due to an inability to add

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490 (1966). However, it is uncertain whether the period prescribed by the common law rule against perpetuities or that prescribed by the statutory rule, MISS. CODE ANN. § 838 (1956), will be applied. This question can be answered only by the court.

[79]DUKEMINIER, *supra* note 60, at 130.

[80]Rohan, *Drafting Condominium Instruments: Provisions For Destruction, Obsolescence and Eminent Domain,* 65 COLUM. L. REV. 593, 613 (1965).

[81]*See id.* at 611, in which the author states that financing such improvements is difficult. The capital must be supplied by the individual owners who must liquidate their personal investments, engage in short-term borrowing, or refinance their unit mortgages, because of the inability to obtain capital by means of a unitary mortgage on the condominium project as a whole.

to, improve, or recondition the project. One suggestion which has been offered to alleviate this dilemma is to provide in the declaration of restrictions for a sinking fund which would finance long-term capital requirements. Assessments for this fund would be spread over a long period of time during the early years of the project and would increase or decrease in amount after a certain specified reserve has been accumulated.[82] Another suggested provision which would alleviate the problem would be to set forth in the declaration as the maximum special assessment which could be levied each year a specified percentage of the individual owner's interest in the condominium project.[83] The percentage should be determined after considering the number of units to be sold in the project in question together with an estimate of the range of incomes which the prospective purchasers are expected to have. There are other provisions which should also be given careful consideration, such as the aggregate percentage of ownership interest in the project which shall be required to vote for the improvement or reconditioning before it can be undertaken.[84] These suggested provisions are only a few of many which may be considered by the draftsman of the declaration of restrictions to prevent the problems which may arise when the condominium project must be reconditioned or when there are owners who desire improvements or additions to the project. A careful consideration of the circumstances attending each individual condominium project and careful draftsmanship can eliminate or greatly diminish these problems.

## CONCLUSION

Although the potential problems discussed above are but a few of those which will ultimately arise under the Act, many of these problems can be avoided by careful draftsmanship or legislative amendment to the Act. In addition to those problems discussed above, the draftsman of the declaration of restrictions should carefully consider such potential problems as the effects of condemnation or partial condemnation of the

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[82] *Id.* at 612.

[83] Rohan, *Problems in the Condominium Field,* in PRACTISING LAW INSTITUTE, COOPERATIVES AND CONDOMINIUMS 292, 293 (4 Real Estate Transcript Series, 1969); *see, e.g.,* MASS. GEN. LAWS ANN. ch. 183A, § 18(b) (Supp. 1973), which provides that any unit owner who does not agree that the improvement should be made may require the organization of unit owners to purchase his unit if the improvement costs an amount in excess of 10 percent of the present value of the condominium.

[84] In relatively small condominium projects where there is substantial equality in incomes among the unit owners, a vote of those owners who hold in aggregate more than 50 percent of the interest in the common areas may be deemed to provide a fair determination. However, in larger condominium projects where there is wide disparity in incomes among the unit owners, a much larger percentage may be desirable.

project. The problem of insuring the project and, at the same time, protecting the individual condominium owner must also be resolved by the draftsman. These considerations engender myriad hypotheticals to which there are no standard answers. Instead, each individual condominium project and the particular circumstances pertaining thereto must be considered and the declaration tailored to fit the project.

The time is rapidly approaching when the need for adequate housing in large urban areas, the high cost of land, and inflationary construction expenses will preclude the erection of single family homes by the masses. Thus, the need for condominiums and the advantages of the condominium concept of ownership are quite evident.[85] In 1971, 16 percent of the nation's housing starts were condominiums; the projected figure for 1972 is 27 percent.[86] The rapid increase in the utilization of the condominium and the relative novelty of this concept in the United States will require that the attorneys and legislative bodies of each state work diligently to guide the emerging law of condominiums in a direction which will facilitate the use of this concept of ownership.

*Lawrence E. Allison, Jr.*

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[85]*See Introduction to the Horizontal Property System, supra* note 18, at 321.

[86]TIME, Aug. 7, 1972, at 59.

# RECENT DECISIONS

CONFLICT OF LAWS — STATUTES OF LIMITATIONS — SUBSTANTIVE FOREIGN STATUTE COMMENCING AT TIME OF DISCOVERY GOVERNS

On April 23, 1969, appellant railroad filed suit in federal district court for the Eastern District of Virginia under diversity jurisdiction,[1] seeking indemnity for expenses arising from the derailment of several train cars in Laurel, Mississippi, on January 25, 1969.[2] The suit was subsequently transferred to the federal district court for the Southern District of Mississippi for the convenience of the parties and witnesses.[3] Appellant alleged common law negligence, strict products liability, and breach of warranty in the manufacture of a tank car and wheel which appellant contended caused the derailment.[4] Appellees (the manufacturer of the wheel, the builder of the tank car, and the owner of the tank car) contended that the action accrued and the statute of limitations commenced in 1962, when the car in question was transferred to appellant, and moved for summary judgment based on, *inter alia,* the 6-year Mississippi statute of limitations.[5] The district court granted appellees' motion for summary judgment concluding that the suit was untimely.[6] Appellant contended however that *Van Dusen v. Barrack*[7] required a federal court to apply Virginia law, and thus, appellant's cause of action did not accrue

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[1]28 U.S.C. § 1332 (1970).

[2]A number of persons were killed or injured and there was extensive property damage. Appellant immediately began settling claims believing that it was technically liable under Mississippi law. MISS. CODE ANN. § 1741 (1956) (injury to persons or property by railroads, prima facie evidence of want of skill).

[3]28 U.S.C. § 1404(a) (1970) provides, in part:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

[4]A wheel on one of the tank cars carrying propane gas collapsed causing the tank car and others like it to explode and burn.

[5]MISS. CODE ANN. § 722 (1956) provides as follows:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

[6]The court based its holding on the Mississippi rule that a cause of action in tort accrues at the time of the wrongful act or omission rather than when such act or omission is discovered or causes harm. Therefore, the 6-year statute commenced in 1962, when the car was sold and turned over to appellant, thus barring its suit filed in 1969.

[7]376 U.S. 612 (1964). The court determined that a change of venue pursuant to 28 U.S.C. § 1404(a) (1970) was merely a change of courtrooms and that the transferee district was obligated to apply the state law which would have been applied if there had been no change of venue. 376 U.S. at 639; *accord,* Ryer v. Harrisburgh Kohl Bros., Inc., 307 F. Supp. 276 (S.D.N.Y. 1969); Sund v. American Can Co., 272 F. Supp. 969 (E.D. Wis. 1967).

and the statute of limitations did not begin to run until the derailment.[8] On appeal to the Fifth Circuit Court of Appeals, *held,* reversed and remanded. Mississippi's 6-year statute of limitations is substantive and thus applies to a suit initiated in a foreign jurisdiction when the cause of action arose in Mississippi. Furthermore, in products liability cases, the statute does not commence until plaintiff's injury is discovered. *Alabama Great Southern Railroad v. Allied Chemical Corp.,* 467 F.2d 679 (5th Cir. 1972).

English and American courts have traditionally characterized the time limitations for bringing suit on a common law cause of action as procedural (affecting the remedy only) and having no extraterritorial effect. Thus, causes of action accruing in one state but tried in another will be subject to the limitations period of the forum (*lex fori*).[9] The *lex fori* rule follows the standard laid down by the Dutch conflict of laws writers of the 17th century.[10] The rule was first applied in England in 1705 in the case of *Dupleix v. DeRover*[11] and was applied in the United States in 1839 in *McElroyle v. Cohen.*[12] Due to well-founded criticism that the practical results of the *lex fori* rule depend on where the lawsuit is brought, and that causes of action barred by the state where the action accrued *(lex loci)* can nevertheless be sued on if the plaintiff can catch the defendant in a favorable forum,[13] many states have enacted "borrowing statutes."[14] Such statutes preclude an action if it is barred by a statute

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[8]Under Virginia law a tort action accrues when injury is sustained rather than when the wrongful act occurs. *E.g.,* Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969).

[9]J. Beale, Conflict of Laws § 603.1 (1935); H. Goodrich, Conflict of Laws § 85 (4th ed. E. Scoles 1964); M. Hancock, Torts in the Conflict of Laws 135 (1942). The problem of forum versus foreign jurisdiction's statute of limitations was first present in connection with actions alleging breach of contract during the first half of the 19th century. America and England established a doctrine that such actions must be brought within the period prescribed by the statute of the forum. *Id.* The same doctrine was subsequently applied in the field of tort. *See, e.g.,* McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830); Munos v. Southern Pac. Co., 51 F. 188 (5th Cir. 1892).

[10]Comment, *The Statute of Limitation and the Conflict of Laws,* 28 Yale L.J. 492 (1919).

[11]23 Eng. Rep. 950 (1705).

[12]38 U.S. (13 Pet.) 312 (1839).

[13]R. Leflar, Conflict of Laws § 66, at 120 (1959).

[14]The states with borrowing statutes are: Alabama, Ala. Code tit. 7, § 37 (1958); Alaska, Alaska Stat. § 09.10.220 (1962); Arizona, Ariz. Rev. Stat. Ann. §§ 12-506, -07 (1956); California, Cal. Civ. Pro. Code § 361 (1954); Colorado, Colo. Rev. Stat. Ann. § 87-1-19 (1963); Delaware, Del. Code Ann. tit. 10, § 8120 (1953); Florida, Fla. Stat. Ann. § 95.10 (1943); Hawaii, Hawaii Rev. Stat. § 657-9 (1968); Idaho, Idaho Code § 5-239 (1948); Illinois, Ill. Rev. Stat. ch. 83, § 21 (1959); Indiana, Ind. Code § 2-606 (1967); Iowa, Iowa Code § 614.7 (1958); Kansas, Kan. Stat. Ann. § 60-516 (1964); Kentucky, Ky. Rev. Stat. § 413.320 (1953); Louisiana, La. Civ. Code Ann. art. 3532 (West 1960); Maine, Me. Rev. Stat. Ann. tit. 14, § 866 (1964); Massachusetts, Mass. Gen. Laws Ann. ch. 260, § 9 (1956); Michigan, Mich. Comp. Laws § 600.5861 (1948); Minnesota, Minn. Stat. § 541.14 (1947); Mississippi, Miss. Code

of the place where the defendant resides, or if it is barred by a statute of the place where the action accrued, *lex loci*.[15] But, if the action is barred locally, the "borrowing statute" is generally ignored, and the statute of the forum is applied.[16] With the enactment of statutes of limitations that not only affect the remedy, but also extinguish the right,[17] several exceptions to the traditional *lex fori* rule have arisen. First, where a foreign statute creating a right includes a limitation, the foreign statute will be applied.[18] In the leading case of *The Harrisburg*,[19] involving a wrongful death statute, the court determined that the statute created a new legal liability and that the right thereon was conditioned upon bringing suit within a specified time.[20] Second, where the statute creating the right has a "built-in" limitation, and there is another statute which specifically limits such right, such limitation statute will be followed by foreign courts.[21] Third, where the foreign statute has characteristics that the forum considers substantive, the foreign statute will be ap-

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ANN. § 741 (1956); Missouri, MO. REV. STAT. § 516.180 (1952); Montana, MONT. REV. CODES ANN. § 93-2717 (1947); Nebraska, NEB. REV. STAT. § 25-215 (1956); New York, N.Y. CIV. PRAC. § 202 (1971); Nevada, NEV. REV. STAT. § 11.020 (1957); North Carolina, N.C. GEN. STAT. § 1-21 (1969); Oklahoma, OKLA. STAT. tit. 12, § 99 (1960); Oregon, ORE. REV. STAT. § 12.260 (Supp. 1971); Pennsylvania, PA. STAT. ANN. tit. 12, § 39 (1953); Rhode Island, R.I. GEN. LAWS ANN. § 9-1-18 (1956); Tennessee, TENN. CODE ANN. § 28-114 (1955); Texas, TEX. REV. CIV. STAT. arts. 5542, 5543 (1958); Utah, UTAH CODE ANN. § 78-12-45 (1953); Virginia, VA. CODE ANN. § 8-23 (1950); Washington, WASH. REV. CODE § 4.16.290 (1962); West Virginia, W. VA. CODE ANN. § 55-2A-2 (1966); Wisconsin, WIS. STAT. § 893.205 (1965); Wyoming, WYO. STAT. ANN. § 1-25 (1957).

[15]In a sense, these statutes do not change the common law, *lex fori*, rule; rather they afford opportunities for the law of other jurisdictions to be given a certain effect under the law of the forum. R. LEFLAR, *supra* note 13, § 66, at 120.

[16]Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 298 (1960); *see, e.g.*, Wells v. Simonds Abrasive Co., 345 U.S. 515 (1953); Fisher v. Burk, 123 Miss. 781, 86 So. 300 (1920). *Contra, e.g.*, Koeppe v. Great Atl. & Pac. Tea Co., 250 F.2d 270 (6th Cir. 1957).

[17]*E.g.*, MISS. CODE ANN. § 743 (1956), prescribes that the running of the statute of limitations extinguishes the right as well as barring the remedy. *See, e.g.*, Hawkins v. Southern Pipe & Supply Co., 259 So. 2d 696 (Miss. 1972); Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

[18]"Such special and limited statutory rights bear a strong resemblance to *actiones temporals* of Roman law, actions founded upon the *judicium dabo* of the praetorian edict, and effective only if exercised within the period stated." Ailes, *Limitation of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 495 (1933).

[19]119 U.S. 199 (1886); *accord*, Louisville & N.R.R. v. Dixon, 168 Miss. 14, 150 So. 811 (1933).

[20]The substantive right as well as the procedural remedy is conditioned on the "built-in" limitation, so upon its expiration there remains no right to which the remedies of another jurisdiction may be applied. G. STUMBERG, CONFLICT OF LAWS 143 (1937); Annot., 95 A.L.R.2d 1162, 1164 n.8 (1964).

[21]Annot., 95 A.L.R.2d 1162, 1175 (1964); *e.g.*, Davis v. Mills, 194 U.S. 451 (1904). *Contra*, Bournais v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955).

plied.[22] And fourth, where the enacting state's courts consider the statute to be substantive, the forum state will also construe it as such.[23] There is some authority that where a foreign state's general statute of limitations is so worded or construed to limit not merely the remedy but to extinguish the right also, then the foreign statute will be applied at the forum.[24] Mississippi, as illustrated by *Louisiana & Mississippi Railroad Transfer Co. v. Long*,[25] generally applies the *lex fori* rule. Nevertheless, Mississippi will apply a foreign statute of limitations in a conflict of laws case if Mississippi's "borrowing statute" is applicable, if the foreign limitation is built into a statute creating the right,[26] or if the foreign statute of limitations is considered to be substantive.[27]

In the present case the court, after reviewing *Van Dusen*,[28] determined that it should view the case as if it were sitting in Virginia where the suit was filed. The court concluded that under the *Erie-Klaxon* rule,[29] the substantive law of Virginia, including its conflict of laws rules, should be employed in determining whether to apply the Virginia or Mississippi statute of limitations. In analyzing several Virginia decisions, the court noted that Virginia considers its limitation law to be procedural and generally controlling in a Virginia forum,[30] but when an action is brought on a right created by a foreign statute with a "built-in" limitation period, Virginia courts will apply the foreign limitations statute.[31] The court reasoned, however, that Virginia law did not definitively resolve the court's choice of law problem, since the instant case was grounded on a common law right subject to a Mississippi statute of limitations not only affecting the remedy but also

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[22]*E.g.*, Wood & Selick v. Compagnie Gen. Transatlantique, 43 F.2d 941 (2d Cir. 1930) (the "attributes test").

[23]*E.g.*, Goodwin v. Townsend, 197 F.2d 970 (3d Cir. 1952).

[24]Annot., 95 A.L.R.2d 1162, 1181-82 (1964); *e.g.*, De Valleda Da Costa v. Southern Pac. Co., 167 F. 654 (C.C. Mass. 1909); Andrews v. Bacon, 38 F. 777 (C.C. Mass. 1889); Tarbell v. Grand Trunk R.R., 94 Vt. 449, 111 A. 567 (1920).

[25]159 Miss. 654, 131 So. 84 (1930); *accord*, Guthrie v. Merchants Nat'l Bank, 254 Miss. 532, 180 So. 2d 309 (1965); Louisville & N.R.R. v. Pool, 72 Miss. 487, 16 So. 753 (1895).

[26]*E.g.*, Bethlehem Steel Co. v. Payne, 183 So. 2d 912 (1966); Hamilton v. Cooper, 1 Miss. (Walker) 242 (1832).

[27]Perkins v. Guy, 55 Miss. 153, 177 (1877).

[28]376 U.S. 612 (1964) (law of transferor state governs).

[29]Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The *Erie* decision established the rule that in a diversity action, the federal court must apply the substantive law of the state wherein it sits, whether the law is declared by statute or by the highest court's decision. In Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the Court held that a state's conflict of laws rules are substantive and that they are to be applied by the federal district court sitting in that state.

[30]*E.g.*, Owens v. Combustion Eng'r, Inc., 279 F. Supp. 257 (E.D. Va. 1967).

[31]*E.g.*, Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958); Norman v. Baldwin, 152 Va. 800, 148 S.E. 831 (1929).

conditioning the right.[32] The court further reasoned that although Virginia decisions did not resolve the choice of law problem, they did establish the rule of examining, when determining which statute of limitation is applicable, whether the foreign statute affects the right at issue or only the remedy. Applying this rule the court concluded that a Virginia court would apply the Mississippi period of limitations in the present case.[33]

The fundamental principle in the law of limitations of actions is that the period of limitation begins to run when the cause of action accrues.[34] Therefore, in deciding whether a cause of action is barred by the appropriate statute of limitations, it must first be determined at what point the action accrues.[35] Traditionally it has been held that a cause of action accrues and the statute commences, for breach of contract, at the time the contract is broken;[36] for negligence of an attorney, at the time of breach of duty;[37] for malpractice of a physician, at the time of the act of negligence or unskilled treatment;[38] for breach of warranty, at the time of sale or delivery;[39] and for tort or negligence, at

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[32]MISS. CODE ANN. § 743 (1956) provides:

> The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy....

[33]The court predicted that the Virginia courts would take the approach set forth in the *Restatement of Conflicts* which provides that an action may not be brought in another state if barred in the state of the otherwise applicable law by a statute of limitations which bars the right. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 143 (1971). Mississippi is the state of the otherwise applicable law, since Virginia applies the law of the place of the wrong in tort cases. *E.g.*, Atlantic Coast Line R.R. v. Withers, 192 Va. 493, 65 S.E.2d 654 (1951).

[34]21 CENT. L.J. 148, 153 (1885); Annot., 4 A.L.R.3d 821, 829 (1965). The Mississippi Supreme Court has repeatedly held that a cause of action arises and the statute of limitations begins to run the moment an action may be maintained to enforce a legal right. *E.g.*, Rankin v. Mark, 238 Miss. 858, 120 So. 2d 435 (1960); Gault v. Branton, 222 Miss. 111, 75 So. 2d 439 (1954).

[35]*See* Davis, *Tort Liability and the Statute of Limitation*, 33 Mo. L. REV. 171, 187 (1968).

[36]*E.g.*, Aachen & Munich Fire Ins. Co. v. Morton, 156 F. 654 (6th Cir. 1907); Manning v. Perkins, 86 Me. 419, 29 A. 1114 (1894).

[37]*E.g.*, White v. Reagan, 32 Ark. 281 (1894); Crawford v. Gaulden, 33 Ga. 173 (1862).

[38]*E.g.*, Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Cappuci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919). Today, many courts ignore the traditional rule. *E.g.*, Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942) (statute commences at the time the treatment is terminated); Miami v. Brooks, 70 So. 2d 306 (Fla. 1954) (on the date of damage); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943) (at the time of discovery of injury).

[39]*E.g.*, Johnson v. Crisler, 156 Miss. 266, 125 So. 724 (1930). The basis for this rule was formulated in Allen v. Todd, 6 Lans. 222 (4th Dep't N.Y. 1872), to the effect that a warranty of fitness relates to the existing or present condition of the goods, and therefore may be breached only at the time of the sale or at the time of delivery.

the moment a wrongful or negligent act or omission causes injury, however slight, for which the law affords a remedy.[40] These rules are founded on the premise that the act itself is the basis of the action and is not severable from its consequences.[41] In 1830, the United States Supreme Court, in *Wilcox v. Executors of Plummer*,[42] acknowledged the well-settled principle that a cause of action runs from the act or omission which produces the injury. In the recent case of *Wilson v. Retail Credit Co.*,[43] the court stated that it was an established rule in Mississippi, that a cause of action runs from the time of injury and not from the time of its discovery. The practical effect of the traditional rule, in cases where the injured party is unaware of any damage, has been to commence the statutory period before a suit could be maintained.[44] As a result, some courts have delayed commencement of the statutory period, despite the existence of a theoretical right to recovery, until the plaintiff discovers or should have discovered the wrong,[45] or until substantial damage occurs.[46] Also, since the advent of strict liability in tort,[47] many courts have become increasingly aware of the inapplicability of the traditional "time of the wrong" rule in products liability cases.[48] Nevertheless, jurisdictions such as Mississippi have doggedly adhered to the traditional rule in negligence cases, and have continued to apply this rule in products liability disputes.[49]

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*See* 12 TEX. L. REV. 478, 482 (1934). *Contra,* Felt v. Reynold's Fruit Evap. Co., 52 Mich. 602, 18 N.W. 378 (1884); Williamson v. Heath, 49 Tex. Civ. App. 254, 108 S.W. 983 (1908).

[40]*E.g.*, Raynor v. Mintzer, 72 Cal. 585, 18 P. 82 (1887); Griffin v. New Orleans Drain. Comm'n, 110 La. 840, 34 So. 799 (1903).

[41]19 N.C.L. REV. 599, 600 (1941).

[42]29 U.S. (4 Pet.) 172, 182 (1930).

[43]325 F. Supp. 460, 465 (S.D. Miss. 1971).

[44]9 U. FLA. L. REV. 104 (1956).

[45]*E.g.*, Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

[46]*E.g.*, Kohout v. Adler, 327 S.W.2d 492 (Mo. App. 1959).

[47]*See* Comment, *Products Liability — Accrual and Limitations of Actions,* 35 TENN. L. REV. 335, 349 (1968) (an overview of developments in the area of strict liability in tort); Annot., 13 A.L.R.3d 1057 (1967).

[48]In products liability cases alleging breach of warranty of wrongful act or omission, these courts have followed the discovery rule. *E.g.*, R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (applying La. law); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960) (applying Conn. law); Puretex Lemon Juice, Inc. v. S. Riekes & Sons, Inc., 351 S.W.2d 119 (Tex. Civ. App. 1961).

[49]In Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962), a products liability case for damages to a truck caused by a faulty carburetor, *held,* the statute of limitations commenced at the time of sale and delivery. *Accord,* Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd,* 450 F.2d 1176 (5th Cir. 1971); Wellston Co. v. Hodges, 114 Ga. App. 424, 151 S.E.2d 481 (1966). Such holdings appear to employ the presumption that damage is due to later operation and maintenance. *See, e.g.*, Mondshour v. General Motors Corp., 298 F. Supp. 111 (D. Md. 1969).

In the present case the court noted that the Mississippi courts have repeatedly held that a cause of action in tort accrues at the time of the wrongdoing or "time of the delivery," rather than when the wrong is discovered or causes harm.[50] The court cited two cases, *M.T. Reed Construction Co. v. Jackson Plating Co.*,[51] and *Wilder v. St. Joseph Hospital*,[52] in which the Mississippi Supreme Court rejected the "time of discovery" rule in negligence actions. The court reasoned, however, that these cases were not controlling because they did not involve products liability, and because there was no suggestion in this case, as in *Reed* and *Wilder*, that appellant knew or should have known of the defect. The court also stated that Mississippi's policy of repose would not be offended by an action brought 3 months after the derailment.[53] The court further reasoned that since Mississippi, in *State Stove Manufacturing Co. v. Hodges*,[54] had adopted the policy of strict liability for defective products, a Mississippi court would not hold that strict liability of sellers of defective products is always restricted to the first 6 years of the product's life. The court therefore concluded that appellant's cause of action did not accrue until the derailment in 1969, and thus was timely filed.

In the instant case, the court wisely refused to apply the traditional conflict of laws rule that statutes of limitations are procedural and have no extraterritorial effect. Clearly a foreign limitations statute that not only bars the remedy but also conditions the right can hardly be dismissed by the forum court as a mere regulation of procedure.[55] Mississippi's general statute of limitations[56] is clearly substantive, for section 743 of the Mississippi Code explicitly states that the completion of the limitation period not only bars the remedy, but defeats and extinguishes the right as well.[57] Many jurisdictions have refused to hold that such a statute is substantive, because the right is extinguished by a general statute rather than one which applies to a specific cause of action. Such a variation should not affect the forum's decision since a general statute affecting "all" actions is just as definitive as a specific statute: neither leaves any room for doubt or speculation as to which rights are to be extinguished. Therefore, a substantive statute of limitation,

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[50]*See, e.g.*, Walley v. Hunt, 212 Miss. 294, 54 So. 2d 393 (1951); McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641 (1900).

[51]222 So. 2d 838 (Miss. 1969) (negligence in building construction).

[52]225 Miss. 42, 82 So. 2d 651 (1955) (malpractice case).

[53]Cook v. Lindsey, 34 Miss. 451, 455 (1857) (statute of limitations enacted to protect parties against stale demands, which might be more easily established after a great lapse of time).

[54]189 So. 2d 113 (Miss. 1966). In this case, Mississippi adopted the policy of strict tort liability as set forth in the *Restatement of Torts* which provides that one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is liable for physical harm caused by the product. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[55]Ailes, *supra* note 18, at 494.

[56]MISS. CODE ANN. § 722 (1956).

[57]*Id.* § 743.

whether based on a common law action generally, or built into a statutory right, or speaking to a specific cause of action, should be applied at the *lex fori*. In this case the court has accepted just such a progressive concept of the effect of statutes of limitations in conflict of laws. A uniform system for determining the effect of foreign statutes in conflict of laws questions, such as a uniform borrowing statute,[58] is needed to prevent inconsistent decisions in cases based on the same facts but brought in jurisdictions which have different views on the effect of a foreign statute of limitations at the forum.[59] Until such a system is established, the courts will be susceptible to "forum-shopping" by the plaintiff, thus placing an increased burden on the defendant.

Once the question of the appropriate statute of limitations is resolved, it becomes necessary to determine at what point the statute begins to run. In the present case the court held that Mississippi's "time of the wrong" rule was inapplicable. Although it may appear that the court stepped beyond its permissible scope of power in rejecting the state's established rule,[60] a closer study reveals that the Mississippi courts have never determined when a cause of action accrues in a case involving strict tort liability for defective products. Therefore, the court properly determined how a Mississippi court would rule in such a case.[61] The court's conclusion that the time of discovery of injury or damage commences the statute of limitations in a defective products case is receptive to the needs of a modern society. A person cannot be expected to understand the interworkings or detect the latent deficiencies of the numerous mechanical devices that he uses each day. Consequently, great injustice results when a defective product is purchased but does not cause noticeable injury until after the statutory period has run. Furthermore, adherence to the "time of the wrong" rule permits the negligent tortfeasor to escape liability by his silence and the subtle nature of the

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[58]In 1957 the National Conference of Commissioners on Uniform State Laws adopted THE UNIFORM STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT. The act holds that a period of limitation applicable to a claim accruing outside of the forum state shall be that prescribed by the law of the *lex loci* or by the law of the *lex fori*, whichever first bars the claim. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 264 (1957) (ABA approved this act on July 16, 1957). At the present, only two states, Michigan and West Virginia, have explicitly adopted this act. *See* note 14 *supra*.

[59]It should be remembered that the primary objective of conflict of laws is the establishment of a system in which the accident of the choice of a particular forum has no substantial effect on the result reached in a case. Vernon, *supra* note 16, at 297.

[60]*E.g.*, Harris v. Hercules, Inc., 455 F.2d 267 (8th Cir. 1972) (court of appeals' function in diversity case is to determine what the applicable state law is, not what it should be); Mothner v. Ozark Real Estate Co., 300 F.2d 617 (8th Cir. 1962) (in diversity case, the court of appeals does not formulate the law of a state).

[61]*E.g.*, Insurance Co. of N. Am. v. English, 395 F.2d 854 (5th Cir. 1968); Hellawell v. Hempstead, 10 F. Supp. 771 (E.D.N.Y. 1935) (to determine the law of a state, federal court may search for public policy of said state, in decisions and practice, in absence of imperative words in statutes thereof).

injuries inflicted.[62] The law must progress to meet these new problems, and if state legislatures procrastinate, or fail to realize conflicts between the law and modern life, then state courts must take the initiative. The traditional rules discussed in the present case need to be realigned to more adequately meet the problems of a highly mechanized, diversified, and changing society.

*David Watkins Mockbee*

CONSTITUTIONAL LAW — IRREBUTTABLE PRESUMPTION OF NONRESIDENCY INVALIDATES TUTION RESIDENCY REQUIREMENTS FOR STUDENTS

Two University of Connecticut students[1] filed suit in federal district court[2] challenging the validity of a state statute[3] that prevented them from changing their status as non-resident students.[4] The plaintiffs, who had recently moved to Connecticut and enrolled in the university, were classified as nonresident students[5] and were charged a higher tuition

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[62]19 N.C.L. REV. 599, 600 (1941).

[1]The original plaintiff, Margaret Marsh Kline, a California resident, married a Connecticut resident and applied for admission to the University of Connecticut. She and her husband established permanent residence in Connecticut. She now has a Connecticut driver's license and is registered as a Connecticut voter.

The intervening plaintiff, Patricia Catapano, while living outside the State of Connecticut, applied for admission to the University of Connecticut. She then moved to Connecticut to enroll at the university. She, too, has a Connecticut driver's license and is registered as a Connecticut voter.

[2]The claims were brought under the provisions of 42 U.S.C. § 1983 (1970), and jurisdiction is based on 28 U.S.C. § 1343 (3) (1970).

[3]CONN. GEN. STAT. REV. § 10-329 (b) (Supp. 1972), which provides in part:

> (a) (2) [A]n "out-of-state student," if single, means a student whose legal address for any part of the one-year period immediately prior to his application at a constituent unit of the state system of higher education was outside of Connecticut.
>
> (a) (3) [A]n "out-of-state student," if married and living with his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut.
>
> (a) (5) . . . The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit.

[4]Plaintiffs sought an order: (1) declaring the challenged tuition regulation unconstitutional and void as violative of the due process and equal protection clauses; and (2) permanently enjoining the defendants from classifying them as nonresidents.

[5]Mrs. Kline's nonresident classification was based on subsection (a) (3) of CONN. GEN. STAT. REV. § 10-329 (b) (Supp. 1972), while Miss Catapano's classification was based on subsection (a) (2) of CONN. GEN. STAT. REV. § 10-329 (b) (Supp. 1972).

than resident students.[6] The plaintiffs contended that since the statute prevented them from ever changing their residency status,[7] it violated the due process and equal protection clauses of the 14th amendment. The District Court of Connecticut, *held,* a statutory provision, which creates an irrebuttable presumption of nonresidency and operates to deny a student the opportunity to show change of his residence status, is unconstitutional and violates the due process and equal protection clauses of the 14th amendment. *Kline v. Vlandis,* 346 F. Supp. 526 (D. Conn. 1972), *appeal docketed,* No. 72-493, U.S., Aug. 25, 1972.

The current durational residency requirements originated from the Elizabethan poor laws, which evolved from the idea that each individual belonged to a certain community which had the obligation of supporting him in time of need.[8] The durational requirement itself refers to a period of residency necessary to establish a person's domiciliary intent before he can obtain the benefits of a resident.[9] In ancient Rome, a student retained his original domicile until his studies were completed.[10] This concept was adopted in the United States when the

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[6]For the first semester each plaintiff was required to pay $150 for tuition and $200 for the nonresident fee, whereas the residents were charged nothing. For the second semester both were required to pay $425 for tuition and $200 for the nonresident fee, whereas the residents were charged $175 for tuition.

[7]CONN. GEN. STAT. REV. § 10-329 (b)(a)(5) (Supp. 1972).

[8]*See* Z. CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 164 (1956); Coll, *Perspectives in Public Welfare: The English Heritage,* in WELFARE IN REV. 1 (1966); Mandelker, *The Settlement Requirement in General Assistance,* 1955 WASH. U.L.Q. 355.

In 17th century England, each community was responsible for its poor, and each community was hesitant to allow newcomers to move in because they might some day become impoverished, and thus become a burden. Z. CHAFFEE, *supra,* at 164. "Residence requirements are a manifestation of a peculiar fear of poverty, the fear which is felt by those who are not likely themselves ever to be poor, but who may have to bear the cost of keeping the less fortunate alive." Katkin, *Residence Requirements: The Unresolved Issues,* 36 ALBANY L. REV. 35, 36 (1971).

[9]Domicile is the place where a party has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, at 41-42 (1971). Two elements are necessary for a person to establish a new domicile: he must take up residence at the new domicile, and he must intend to remain there. Mitchell v. United States, 88 U.S. (21 Wall.) 350, 352 (1874); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 86 (2d ed. 1970).

For the purposes of student residency tests, the word "residence" means "domicile." Dale v. Irwin, 78 Ill. 170 (1875); Fry's Election Case, 71 Pa. 302 (1872); Spencer, *The Legal Aspects of the Nonresident Tuition Fee,* 6 ORE. L. REV. 332, 342 (1927); Comment, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUSTON L. REV. 241, 243 (1969).

[10]Morris, *Domicile in General and of Students in Particular,* 12 ME. L. REV. 112 (1919). If, however, he remained there for longer than 10 years, he was presumed to make his permanent abode at the place of study, and thus, could acquire a new domicile. *Id.*

courts held that residing in a place as a student,[11] or for the sole purpose of obtaining an education,[12] does not confer domicile. The intent to remain for an indefinite period was usually required,[13] and most courts required evidence of intent other than the student's presence at the university.[14] Such evidence was necessary to rebutt the presumption that out-of-state students are in the state solely for educational purposes.[15] Although the courts have generally held that a state may charge

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[11]*In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925); Sanders v. Getchell, 76 Me. 158 (1884); Inhabitants of Granley v. Inhabitants of Amherst, 7 Mass. 1 (1810).

In 1926, 22 states had constitutional or statutory provisions that a person shall not be held to have gained or lost a residence for the purposes of voting while a student at any institution of higher education. Spencer, *supra* note 9, at 364; 35 YALE L.J. 635, 636 (1926). However, a Massachusetts court held that a person of age and otherwise qualified to vote is entitled to vote in that town even though he is a student. Putnam v. Johnson, 10 Mass. 847 (1813).

[12]Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969); Jefferson v. Cooke, Civil No. 4982 (S.D. Miss., filed Sept. 28, 1972); State v. Daniels, 44, N.H. 383 (1862). *Contra,* Berry v. Wilcox 44 Neb. 82, 62 N.W. 249 (1895), holding that a person qualified as a voter who came to the university primarily for the purpose of obtaining an education and having no purpose formed as to his movements after completing college is entitled to vote there.

[13]Some earlier cases require, as a condition of acquiring domicile, that there exist a definite intention to remain permanently. White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888); Bell v. Kennedy (1868), L.R. 1 Sc & Div. 307, H.L. However, most American courts require that there exist merely an intent to remain for an indefinite period, *i.e.,* no present intention of moving therefrom. Sanders v. Getchell, 76 Me. 158 (1884); Putnam v. Johnson, 10 Mass. 487, 501 (1813); State v. Daniels, 44 N.H. 383 (1862); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1900); Fry's Election Case, 71 Pa. 302 (1872). The *Restatement* provides that a student must demonstrate to the appropriate officials that he regards the state as his permanent home, and not merely a temporary home during his student years. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971).

[14]Holmes v. Pino, 131 La. 687, 60 So. 78 (1912); *In re* Garvey, 147 N.Y. 117, 41 N.E. 439 (1895); *In re* Goodman, 146 N.Y. 284, 40 N.E. 769 (1895); Spencer, *supra* note 9, at 345-46.

[15]Kirk v. Board of Regents, 273 Cal. App. 2d 430, 477, 78 Cal. Rptr. 260, 268 (Dist. Ct. App. 1969), *appeal dismissed,* 396 U.S. 554 (1970).

The intent required for domicile can be proven by putting the student ". . . under oath to tell the truth, or have him present a sworn affidavit as to his honest intention in his choice of a new domicile." Morris, *supra* note 10, at 124. However, "too much weight should not be attached to declarations of present and future purpose by a student after the question of residence is raised." Spencer, *supra* note 9, at 352.

Another possible solution for evidencing domiciliary intent might be to require a sworn affidavit by the student promising to remain in the state a given number of years after the student completes his education. A presumption of domiciliary intent would be established by the signing of this statement, and the student would not have to pay the high out-of-state tuition. However, if the student were to violate his pledge

higher tuition to a nonresident than to a resident of a state-supported institution,[16] there is much disagreement whether a durational residency requirement to qualify a student as a resident for tuition purposes is constitutional. The constitutionality of the requirement is questioned upon the theory that the residency requirements infringe upon the rights afforded under the equal protection clause of the 14th amendment and upon the freedom of interstate travel.[17] In the early cases the courts used the traditional equal protection test to determine the validity

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to remain, then he would be required to pay the balance of the higher tuition as if he had been initially classified as an out-of-state student.

Most courts have held that students have the burden of proving change of domicile. Desmore v. United States, 93 U.S. 605 (1876). *Contra,* Board of Trustees v. Benton, No. 5258 (17th Jud. Dist. of Kan., filed Jan. 3, 1972), where it was held that the college had the burden of proving that the student claimant who registered to vote in the town in which he attended a college was not a resident of that voting district.

Proof such as in-state voter registration, driver's license, and income tax returns have been used to evidence the student's intent to remain within the state. Arizona Bd. of Regents v. Harper, 495 P.2d 453, 460 (Ariz. 1972). Other types of proof used have included the address given on loan applications, location of bank used for loans, amount of financial assistance received from out-of-state parents, and student's plans after completing his education. *Id.* at 460.

[16]*See, e.g.,* Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969).

[17]*See* Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education under the Interstate Privileges and Immunities Clause,* 50 NEB. L. REV. 31 (1970); Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 CALIF. L. REV. 567 (1966); Longo & Schroeck, *College Residency Requirements,* 20 CLEV. ST. L. REV. 492 (1971); Comment, *Constitutional Law — Equal Protection — State University's One-Year Waiting Requirement to Attain Resident Status for Tuition Payment Does Not Violate Fourteenth Amendment,* 24 ALA. L. REV. 147 (1971); Comment, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUSTON L. REV. 241 (1969); Comment, *Constitutional Law — The Equal Protection Clause and Durational Residency Requirements for Tuition Purposes at State Universities,* 19 J. PUB. L. 139 (1970); Comment, *Nonresident Tuition Charged By State Universities in Review,* 38 U.M.K.C.L. REV. 341 (1970). *See also* Katkin, *Residency Requirements: The Unresolved Issues,* 36 ALBANY L. REV. 35 (1971).

There are three contexts in which nonresident tuition causes constitutional difficulties: (1) whether it is constitutionally permissible to distinguish between residents and nonresidents; (2) whether it is constitutional to have a waiting-period requirement that the student be domiciled for a given period prior to the date of registration; and (3) whether the standards by which a university determines when a student has become a resident while attending school are constitutional. Note, *Constitutionality of Nonresident Tuition,* 55 MINN. L. REV. 1139 (1971).

One writer suggests that the 26th amendment may supply students with a new legal argument to attack out-of-state tuition. Comment, *Education at a Discount: Qualifying for Resident Tuition at State Universities,* 5 U. MICH. J.L. REF. 541, 549 (1972).

of the durational residency requirement,[18] and the majority of the courts held that the residency requirement was reasonably related to a legitimate state interest or purpose.[19] Yet, in addition the courts held that if the residency requirements infringed upon an individual's fundamental rights, the state could be required to prove a compelling governmental interest to justify the waiting period.[20] In 1969 in the landmark decision of *Shapiro v. Thompson,*[21] the Supreme Court declared that the right to travel was a fundamental right, and required the state to prove a compelling governmental interest to justify the residency requirement. The residency test places the student into three distinct categories: (1) Resident students — state resident for the required waiting period, (2) Nonresident student — state resident for less than the required waiting period, (3) Nonresident student — true nonresident of the state.[22] Such a classification establishes two distinct classes of state

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[18]Prior to *Shapiro,* the courts had considered the constitutionality of durational residence requirements in three major areas: welfare, tuition at state universities, and voting. *See, e.g.,* Harrell v. Board of Comm'rs, 269 F. Supp. 919 (D.D.C. 1967) (welfare); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969) (tuition); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.,* 380 U.S. 125 (1965) (voting).

[19]Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969); Arizona Bd. of Regents v. Harper, 495 P.2d 453 (Ariz. 1972); Kirk v. Board of Regents, 273 Cal. App. 430, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969), *appeal dismissed,* 396 U.S. 554 (1970); Landwehr v. Regents of Univ. of Colo., 156 Colo. 1, 396 P.2d 451 (1964); Thompson v. Board of Regents, 189 Neb. 252, 188 N.W.2d 840 (1971); Glusman v. Trustees of Univ. of N.C., 190 S.E.2d 213 (N.C. 1972).

[20]Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960). *See also* Gant, *Tuition at the State College Level: Denial of Educational Opportunity,* 5 CLEARINGHOUSE REV. 634 (1972). If the right to higher education were a fundamental right, any infringement upon this right would require the state to prove a compelling governmental interest. *Id.* at 636. The California Supreme Court took a step in that direction when they proclaimed education to be a fundamental right in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[21]394 U.S. 618 (1969). In *Shapiro,* the respondents were denied their welfare aid since they had not been residents for at least 1 year prior to their applications for welfare assistance. The Supreme Court, holding that the right to travel is a fundamental right, rejected the traditional equal protection test and held that only a compelling governmental interest could justify the waiting period requirement. *Id.* at 629, 634; *see* United States v. Guest, 383 U.S. 745, 759 (1966). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972), where the residency requirement to vote in state elections was held to be violative of the right to interstate travel.

[22]Comment, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUSTON L. REV. 241, 245 (1969); Comment, *Constitutional Law — The Equal Protection Clause and Durational Residency Requirements for Tuition Purposes at State Universities,* 19 J. PUB. L. 139, 140 (1970).

residents, and most legal writers believe that the state does not have the power to charge a different tuition to its own citizens based upon the length of time they have resided within the state, since the 14th amendment makes all domiciliaries of a state citizens, including newcomers.[23] In several states the courts have followed this interpretation and have held that statutes which do not allow the student to satisfy his tuition residency requirements while attending an educational institution are unconstitutional.[24] Moreover, other courts have declared statutes unconstitutional which provide that if the student did not meet the durational requirement before he became a student at the institution, then he can *never* become a resident for tuitional purposes while he is in school.[25] Although the lower courts have considered the above questions, the Supreme Court has not yet squarely ruled on the validity of the regulations which deny students the right to change their tuition status.[26]

In the instant case the court held that it could not consider the possible denial of due process or equal protection separately since both

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It is well-settled that a person moving his domicile to a new state and enrolling in a state university within 1 year of such a move, is clearly a legal resident (domiciliary) of the state notwithstanding the fact that he is classified as a nonresident for tuition purposes. Comment, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUSTON L. REV. 241, 246 (1969); *see* C. WRIGHT, *supra* note 9, at 86-87 (2d ed. 1970).

[23]Harvith, *supra* note 17, at 578; Comment, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUSTON L. REV. 241, 244 (1969).

[24]Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960); *see* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969). *Contra,* Glusman v. Trustees of the Univ. of N.C., 190 S.E.2d 213 (N.C. 1972), where it was held that a requirement was valid which provided that a student be domiciled in the state for a period of 6 months while not in attendance at an institution of higher education in order to be eligible for an in-state classification. The court stressed the need for imposing stricter requirements on students than mere domicile "to assure that only North Carolina citizens get the benefit of in-state tuition." *Id.* at 220.

[25]Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960). A Board rule which provides that any person classified as a nonresident student for tuition purposes shall not be given opportunity to show change of residential or domiciliary status is arbitrary, capricious, unreasonable, and unconstitutional. *Id.* at 719. *See* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd,* 406 F.2d 883 (8th Cir. 1969), *cert. denied,* 396 U.S. 862 (1969). The court stated in dictum that if the classification of nonresidency placed on a student from another state constitutes an irrebuttable presumption which cannot be overcome, then it would constitute an unconstitutional classification. *Id.* at 123. *Contra,* Glusman v. Trustees of Univ. of N.C., 190 S.E.2d 213 (N.C. 1972), where a regulation was held to be valid which provided that student's residence status be determined at the time of enrollment and not be changed thereafter.

[26]Comment, *Education at a Discount: Qualifying for Resident Tuition at State Universities,* 5 U. MICH. J.L. REF. 541, 546 (1972).

concepts stem from the American ideals of fairness.[27] The court further held that although the state has the power to treat different classes of persons in different ways,[28] the classification of such persons must be reasonable and must have a rational relation to the legislative intent, so that all persons within a class shall be treated alike.[29] The court then concluded that the Connecticut statute created an irrebuttable presumption classifying a student as a nonresident when he was in fact a resident.[30] Such a presumption violates the due process and equal protection clauses of the 14th amendment.[31] In addition the court held that the plaintiffs should be considered bona fide residents of the state at the beginning of their second semester, and that they were entitled to a refund of their out-of-state tuition.

The instant decision represents the latest development in the growing trend of case law to abolish residency requirements in different areas of the law,[32] and its significance lies in the fact that it is one of the first decisions to strike down a state's tuitional residency requirement statute. Through this decision the federal courts reinforce the state decision of *Newman v. Graham*[33] by rendering unconstitutional a statute that operated to freeze a student as a nonresident throughout his attendence at a university. The federal court flatly states that a statute is violative of the due process and equal protection clauses of the 14th amendment since it creates an irrebuttable presumption of nonresidency. Although the result of the decision should have a great impact on this turbulent area of the law, and should make a significant contribution toward settling the constitutional issues surrounding the question of

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[27]The court relied on the opinion in Bolling v. Sharpe, 347 U.S. 497 (1954), where it was contended that though the fifth amendment does not contain an equal protection clause, as does the 14th amendment which applies only to the states, the concepts of equal protection and due process are not mutually exclusive.

[28]*See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[29]*Citing* Reed v. Reed, 404 U.S. 71, 75-76 (1971) and Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[30]The court relied on Carrington v. Rash 380 U.S. 89 (1965), where the Supreme Court invalidated a provision creating an irrebuttable presumption of nonresidence for voting purposes for members in the armed forces and living in the state.

[31]*Citing* Heiner v. Donnan, 285 U.S. 312, 321 (1932) and Durcharme v. Putnam, 161 Conn. 135, 141-143, 285 A.2d 318, 321 (1971).

[32]It appears as though a trend has been set by *Shapiro* to eliminate residency requirements in a vast number of areas. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Keenan v. North Carolina Bd. of Law Examiners, 317 F. Supp. 1350 (E.D. N.C. 1970) (bar examination); King v. New Rochelle Mun. Housing Authority, 314 F. Supp. 427 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (public housing); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970) (treatment in state hospitals); Board of Supervisors v. Robinson, 10 Ariz. App. 238, 457 P.2d 951 (Ct. App. 1969), *vacated as moot*, 105 Ariz. 280, 463 P.2d 536 (1970) (public medical care).

[33]82 Idaho 90, 349 P.2d 716 (1960).

nonresident tuition,[34] the decision itself is disappointing, for the court avoids important questions in the area of nonresident tuition and fails to fully discuss the reasons for its decision. The court avoided any discussion of whether states have the right to impose a higher tuition on nonresident students than on resident students. Moreover the court avoided any determination of whether the durational residency requirement infringes upon a fundamental right of the nonresident and whether the state is required to show a governmental interest to justify such infringement. Had the court discussed these questions in depth, the decision would have been a more solid cornerstone of persuasive authority upon which the large amount of anticipated litigation in this area could build.

One attractive aspect of the case is the method in which the court provided a remedy for the students who were injured by the statute. The court directed that all excess tuition resulting from the students' nonresident classification be refunded. Such a remedy has previously been discussed by various legal authorities,[35] but this is the first instance in which refunds have been allowed. Such a remedy could conceivably be extended to other areas of governmental revenue which might be subject to constitutional questions.[36]

It is incomprehensible that the courts can deny a student the right to show by clear and convincing proof that he has domicillary intent, especially when it allows a person to prove such intent for the sole purpose of establishing diversity of citizenship for federal court.[37] If the reasoning of the court in the instant case is carried to its logical conclusion, such incongruities in the law can be abolished. The courts, however, in extending the reasoning of this and similar cases must consider all possible consequences, for if out-of-state tuition and similar restrictions are removed, it could create a great financial burden for state supported schools.

The Connecticut court in the instant decision has made a progressive step in the area of nonresident tuition, and as a result of this and related cases, the courts can expect more litigation concerning tuitional residency requirements, and students across the nation can expect to see many types of nonresident tuition statutes challenged. Mississippi has a nonresident tuition statute[38] very similar to the Con-

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[34]*See* Note, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139 (1971).

[35]Note, *Universities: The Non-Residence Fee Problem*, 30 KY. L.J. 107, 109 (1941).

[36]For example: occupational licenses, use of public resources, postal services, public transportation, use of public tollways, toll bridges and parking areas, driver's licenses, automobile registrations, gun registrations, and the tremendous number of different taxes. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[37]Williamson v. Osenton, 232 U.S. 619 (1914).

[38]MISS. CODE ANN. § 6800-11 (Supp. 1972). Subsection (5) provides:

> A person who has entered the State of Mississippi from another state and enters an educational institution within twelve (12) months is considered a

necticut statute which was found unconstitutional. It provides that if a student has not lived in the state for more than a year prior to enrollment, he is irrebuttably presumed to be a nonresident and will not be allowed to change his status while he is a student. If the instant decision is affirmed by the Supreme Court,[39] it is obvious that the Mississippi statute could be invalidated for the same reason. Although it is doubtful that the state's right to distinguish between residents and true nonresidents for tuition purposes will, or should, be taken away, no longer will such states as Mississippi and Connecticut be able to keep the newcomer from ever changing his nonresident status for tuition purposes. Also the states will no longer be able to presume conclusively that a newcomer is a nonresident for his first year in the state. Unfortunately such progressive moves will probably not be realized through the legislative process, for few states will voluntarily give up this choice source of revenue. The changes will have to come through the courts.

*Randall D. Waks*

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nonresident. For this reason, any period of time when such a person is enrolled in any educational institution in Mississippi may not be counted as any part of the twelve-month prerequisite to his admission to an institution of higher learning as a resident student. Even though he may have been legally adopted by a resident of Mississippi, or may have been a qualified voter, or a land owner, or may otherwise sought to establish legal residence, such a person will still be considered as being a non-resident of Mississippi if he has entered this State for the purposes of enrolling in an educational institution.

[39]Shortly after this case was heard, the legislature was considering a bill relating to tuition payments by nonresidents which would repeal the particular portions of the statute which are the target of constitutional attack here. Although such a bill was passed (H.R. No. 5302), the Governor of Connecticut vetoed it. Kline v. Vlandis, 346 F. Supp. 526 n.3 (D. Conn. 1972).

CRIMINAL LAW — PERSONAL WAIVER OF RIGHT TO CHALLENGE JURY COMPOSITION REQUIRED WITH GUILTY PLEA

Petitioner was convicted of murder in the Circuit Court of Holmes County, Mississippi after submitting a plea of guilty on the advice of counsel. Petitioner subsequently sought to vacate the sentence alleging that he was denied effective assistance of counsel by the failure of counsel to inform him of the right to challenge the jury composition for the systematic exclusion of Negroes.[1] The circuit court dismisssed petitioner's motion and the decision was upheld by the Mississippi Supreme Court.[2] Petitioner subsequently filed a petition of habeas corpus in federal court contending that he was denied effective assistance of counsel and that his plea of guilty was involuntary and consequently invalid, since he was unaware of his right to challenge the composition of the jury.[3] The United States District Court for the Northern District of Mississippi denied relief on the grounds that the guilty plea was valid and therefore waived all nonjurisdictional defects, including the objection to the systematic exclusion of Negroes from the juries.[4] On appeal to the Fifth Circuit Court of Appeals, *held,* reversed and remanded. Waiver of the constitutional right to challenge jury composition through a plea of guilty must be accomplished personally by the accused and not by counsel without prior consultation with the accused. *Winters v. Cook,* 466 F.2d 1393 (5th Cir. 1972).

A standard enunciating the concept of waiver in a criminal proceeding was first introduced in this country in *Johnson v. Zerbst,*[5] when the United States Supreme Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."[6] The vague standard of *Johnson* was later clarified in *Fay v. Noia*[7] where the Court formulated a more definitive standard of the knowledge and intent required for criminal waiver. The Court held that given consultation with competent counsel,[8] an understanding and knowing for-

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[1]Winters v. State, 244 So. 2d 1, 2 (Miss. 1971).

[2]*Id.*

[3]Jurisdiction was predicated on 28 U.S.C. §§ 2241 *et seq.* (1970).

[4]Winters v. Cook, 333 F. Supp. 1033 (N.D. Miss. 1971).

[5]304 U.S. 458 (1938). The Court had previously considered the issue of waiver in a contextual basis in Patton v. United States, 281 U.S. 276 (1930).

[6]304 U.S. at 464. *Johnson* recognized a presumption against waiver of fundamental constitutional rights. The distinction between waiver of fundamental and nonfundamental rights became an important element in subsequent decisions. *See* United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959); Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964).

[7]372 U.S. 391 (1963); *see* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 CALIF. L. REV. 1262, 1263-64 (1966) [hereinafter cited as Comment, *Criminal Waiver*].

[8]A full discussion of the range of competence required of attorneys in criminal law is precluded by the limited scope and format of a casenote. For a discussion of the test of attorney competence *see* McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Comment, *Criminal Waiver, supra* note 7, at 1276-89.

bearance to assert a federal right in state court for any reason deemed to be a "deliberate by-pass of state procedures," would allow the federal court to deny post-conviction relief.[9] A two-pronged caveat was attached to the standard: the waiver must be the "considered choice of the petitioner," and "a choice made by counsel not participated in by the petitioner does not automatically bar relief."[10] This standard, however, left a question as to the waivers that must of necessity be made personally by the accused.[11] Subsequent cases held that waiver by an attorney pursuant to trial strategy would bind the petitioner (1) in the absence of "exceptional circumstances"[12] or (2) when the waiver would not jeopardize "fundamental rights."[13] The term "exceptional circumstances" was first introduced in *Henry v. Mississippi,*[14] when the Court held that waiver of constitutional claims by counsel without consultation with the client in the course of trial strategy would be a denial of the accused's constitutional rights in the absence of exceptional circumstances. The Court held that the circumstances were to be determined on a case by case basis, and failure of counsel to utilize the contemporaneous objection rule in *Henry* would provide the exceptional circumstances necessary to void the attorney's good faith waiver. The courts also attempted to determine what rights were fundamental and whether the right to challenge the jury composition is such a fundamental right. It is generally established that a conviction or an indictment by a jury that has been selected under a scheme of systematic exclusion of Negroes is a violation of the due process and equal protection clauses of the 14th amendment.[15] Personal waiver of constitutional claims has been limited to a class of fundamental rights including right to trial by jury;[16] entry of plea;[17] or decision to file an appeal;[18] however, no court has extended the requirement for personal waiver to the right to object to jury composition for systematically excluding Negroes.[19]

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[9]372 U.S. at 439.

[10]*Id.*

[11]Comment, *Criminal Waiver, supra* note 7, at 1267.

[12]Brookhart v. Janis, 384 U.S. 1 (1966); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968); Comment, *Criminal Waiver, supra* note 7, at 1267.

[13]*See, e.g.*, United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 83 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959); Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd,* 352 F.2d 639 (D.C. Cir. 1965).

[14]379 U.S. 443 (1965).

[15]Patton v. Mississippi, 332 U.S. 463 (1947); Strauder v. West Virginia, 100 U.S. 303 (1879).

[16]United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959).

[17]United States v. Diggs, 304 F.2d 929 (6th Cir. 1962).

[18]Fay v. Noia, 372 U.S. 391 (1963).

[19]Boykin v. Alabama, 395 U.S. 238 (1968).

Since *Fay v. Noia,*[20] four circuits applied a strict interpretation of *Fay* regarding the waiver of the right to challenge jury composition.[21] Moreover, the Fifth Circuit Court of Appeals has demonstrated an increasing reluctance to allow the waiver of the right to object to jury composition.[22]

In the instant case, the court refused to consider whether a system which excludes Negroes from jury composition constitutes a jurisdictional defect. Additionally, the majority opinion thought it unnecessary to examine the nature of the right to object to such a system on the grounds that any waiver would not knowingly have been relinquished since the petitioner could not waive a right of which he had no knowledge. In addition, the court rejected the argument that counsel's awareness of the right and the failure to object to it constituted an effective waiver. The court then concluded that it is "axiomatic" that any waiver through a guilty plea of the constitutional right to challenge jury composition must be a personal waiver of the accused and not that of an attorney.[23]

Judge Charles Clark in a vigorous dissent maintained that *Henry v. Mississippi*[24] demands that the court examine the surrounding circumstances of each case in which jury composition is in question in order to determine if the attorney's waiver of a constitutional claim is within the "exceptional circumstances" rule of *Henry.*[25] Judge Clark felt that the facts of the instant case did not justify departure from the exceptional circumstances rule of *Henry,* and that the majority's failure to examine the totality of the circumstances resulted in obliteration of the rule. Judge Clark, relying on *United States ex rel. Goldsby v. Harpole,*[26] noted that the right to challenge jury composition could not be classified as fundamental. Judge Clark also believed the majority was incorrect in implying that the attorney was incompetent since there was no evidence of such incompetency. The fact that the attorney did not raise the jury

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[20]372 U.S. 391 (1963). *Fay* strengthened the waiver definition of *Johnson v. Zerbst* in requiring an understanding and knowing forebearance to assert a constitutional right as well as an intentional relinquishment or abandonment.

[21]Henderson v. Tollett, 459 F.2d 237 (6th Cir. 1972); Wade v. Yeager, 377 F.2d 841 (3rd Cir. 1967), *cert. denied,* 393 U.S. 893 (1968); McNeil v. North Carolina, 368 F.2d 313 (4th Cir. 1966); Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964).

[22]Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964); Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964); United States *ex rel.* Seals v. Winman, 304 F.2d 53 (5th Cir. 1962); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959).

[23]The court remanded the case and specifically directed that the lower court ascertain whether Negroes were in fact systematically excluded from juries in Holmes County.

[24]379 U.S. 443 (1965).

[25]The dissent stated that the requirement that defense attorneys explain every possible constitutional right to clients creates an undue burden, especially when the accused is illiterate.

[26]263 F.2d 71 (5th Cir. 1959). The majority opinion also cited *Goldsby* as support for its decision. The dissent emphatically maintained that this was untrue.

composition issue was not evidence of incompetency, but instead a "deliberate by-pass" and waiver under *Fay v. Noia* and *Henry*.[27] Judge Clark therefore concluded that the plea was voluntarily and intelligently entered with the advice of competent counsel and should constitute a waiver of the constitutional right to challenge the juries. Although the majority opinion tactfully evaded the question of the nature of the right in question, *i.e.,* whether it was jurisdictional or nonjurisdictional, it implicitly decided the issue by requiring a personal waiver by the accused regardless of the intentions or strategy employed by his counsel. The court also evaded the issue of ineffective counsel on the premise that a more fundamental argument supported Winters' claim; that petitioner could not waive a right of which he had no knowledge. In the interest of judicial efficiency, it would be wise for the court to expressly determine whether this right is a fundamental, jurisdictional element of criminal procedure. If the court feels that the right is so inherently fundamental within the guilty plea system that it should always require personal waiver, then it should so decide and allow the certain deluge of habeas corpus petitions to materialize.[28]

Although the consequences flowing from the decision are obvious, it is imperative that they be understood. Decisions such as the instant case can create unreasonable burdens upon criminal lawyers in requiring explanations of every plausible constitutional claim to the client. This is especially true when the accused is uneducated. Additionally, requiring a personal waiver of every constitutional claim could increase the cost of defending a prosecution, an important consideration for many clients. Opinions such as the instant case could provide the impetus for multitudes of habeas corpus petitions for any decision or action taken by an attorney, regardless of competency and good faith, as long as the client is not consulted prior to the action.

As Judge Clark noted, however, where the actions of an attorney do not prejudice the client, it is questionable whether the attorney's failure to require a personal waiver of the constitutional claim should be allowed to void a valid judgment. In the petitioner's situation it would have been a practical certainty that the plea would have been guilty even if he had known of his right to object to the composition of the jury. The attorney acted in the best interest of the petitioner with the knowledge that the likely result in a jury trial would be the death penalty. Winters gained an advantage by entering a guilty plea, and, if the law did not prohibit the imposition of more stringent penalties on retrial, it is unlikely that a new trial would have been sought.

Should the doctrine of the instant opinion emerge unscathed on rehearing, the effect could be retroactive. Many prisoners convicted as a result of guilty pleas would practically have a guarantee of release under habeas corpus petitions, and the states would be confronted with

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[27]Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963).

[28]The Supreme Court extended to persons of the Caucasion race the right to challenge exclusion of Negroes from juries. Peters v. Kiff, 92 S. Ct. 2163 (1972).

the heavy burden of reindicting and trying a substantial number of prisioners. Therefore, a major proposition which should be analyzed by the court is whether this concept will be applied retroactively. In previous decisions concerning retroactivity the United States Supreme Court has spoken in terms of weighing judicial integrity against the particular constitutional claim. Yet it appears that collateral attack on final judgments through post-conviction relief was predicated on the effect on due process in the trial process itself. The Court has taken two basic approaches in deciding whether a newly-declared constitutional doctrine should be applied retrospectively or prospectively. First, where the constitutional infringement has had an impact on the jurisdictional integrity of the court or on the fairness of factfinding in trial proceedings, the Court has applied its decisions retrospectively. This was the result in cases concerning the sixth amendment right to counsel,[29] and in cases which struck down decisions in which coerced confessions were used to obtain conviction.[30] Only if a valid waiver was executed could the constitutional right to representation be foregone by an accused. In contrast to the first approach, violation of the exclusionary rule, *i.e.,* evidence obtained in contravention of the fourth amendment prohibition against unreasonable searches and seizures, has been held not to be a jurisdictional defect which would be applied retroactively.[31] If the decision in the instant case is placed within this two-pronged standard of retroactivity, it becomes obvious that the constitutional claim in *Winters* could affect the fundamental fairness of the factfinding process and therefore should be applied retrospectively. Nonetheless, protagonists of *Winters* will maintain that retroactive application will bog down judicial administration and impede judicial efficiency. The exact impact of *Winters* is difficult to determine, primarily because any attempt to select a date when racial jury discrimination ended in Mississippi would be arbitrary. As late as 1970, a jury discrimination suit was upheld in Hinds County, Mississippi;[32] consequently, without a statistical study on a statewide basis there can be no more than an estimate of the burden on the state judiciary if *Winters* is applied retrospectively. Regardless of the final outcome of *Winters,* Southern criminal lawyers should immediately begin to advise their clients of the right to object to the composition of the jury and should require that a personal waiver be executed prior to the entry of a guilty plea.[33]

*William B. Wicker*

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[29]Gideon v. Wainwright, 372 U.S. 355 (1963).

[30]Jackson v. Denno, 378 U.S. 368 (1964); Reck v. Pate, 367 U.S. 433 (1961).

[31]Linkletter v. Walker, 381 U.S. 618 (1965).

[32]Spencer v. State, 240 So. 2d 260 (Miss. 1970); Caston v. State, 240 So. 2d 443 (Miss. 1970).

[33]The Fifth Circuit Court of Appeals has granted a rehearing *en banc* for the instant case.

CRIMINAL LAW — SEARCH AND SEIZURE — A SEPARATE LIVING UNIT WITHIN A MULTI-UNIT DWELLING IS ENTITLED TO PROTECTION AGAINST UNREASONABLE SEARCHES

Appellant was indicted for the unlawful possession of marijuana as a result of evidence taken from appellant's locked bedroom during the authorized search of an apartment "occupied and controlled by Joseph Acquisto."[1] Appellant contended that the search of his room without probable cause and without a warrant for that purpose violated his constitutional rights.[2] The state contended that since the apartment was leased by someone other than the appellant and since the officers had a valid warrant to search the entire apartment, the evidence was lawful and should be admitted. The Circuit Court of Jackson County held for the state, accepting its contention that the search warrant included the room of appellant. On appeal to the Mississippi Supreme Court, *held,* reversed. A person temporarily in possession of a single room in an apartment may be considered the owner of that room and is protected against its unreasonable search. *Scott v. State,* 266 So. 2d 567 (Miss. 1972).

Early English attempts to secure protection from arbitrary governmental encroachments on person and property were disregarded until 1765, when search warrant requirements became firmly established in common law.[3] The adoption of the fourth amendment to the Constitution established similar requirements in this country. The language of the amendment, however, afforded no explicit guidance governing how this protection should be provided, and recent judicial attempts to mold this guarantee into a workable instrument have led to uncertain developments in this area of the law. The Supreme Court first attempted to provide a solution to the problem by excluding from federal prosecutions evidence obtained in searches which violated the fourth amendment.[4]

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[1]Appellant's possessions included a sea bag in which the marijuana was found. The case, however, does not distinguish the search of the bag from the search of the room. Also, the officers were unaware that appellant resided in the apartment. Reasonable inquiry revealed that the apartment was rented to Joseph Acquisto, and therefore his name was the only name mentioned in the affidavit.

[2]MISS. CONST. art. 3, § 23 provides:

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath of affirmation, specially designating the place to be searched and the person or thing to be seized.

*Compare* U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[3]Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

[4]Weeks v. United States, 232 U.S. 383 (1914). Weeks actually held that evidence seized illegally must be returned, but it has become authority for the proposition that evidence is inadmissible. *See* Boyd v. United States, 116 U.S. 616 (1886).

The court reasoned that unless the illegal evidence was suppressed, protection was illusory.[5] In subsequent years, the Court held that although the fourth amendment was applicable to the states through the 14th amendment, the practice of admitting illegally obtained evidence was not prohibited.[6] In *Mapp v. Ohio,*[7] however, the Court reversed and held that the fourth amendment *did* require state courts to exclude evidence obtained in an illegal search.[8] Thus, the "exclusionary rule" was established as the means of enforcing the fourth amendment protection. The problem of determining the legality of a search, however, remained. Attention has centered upon three areas; (1) the reasonableness of the search, (2) the sufficiency of probable cause upon which the search is based, and (3) the extent of the description of the place to be searched.[9] In the first area, the reasonableness of the search, no fixed formula has yet been devised. The Court has held, however, that state as well as federal officers will be governed by the Supreme Court standards of reasonableness.[10] In the area of substantive sufficiency of the probable cause in obtaining state search warrants, the Supreme Court, in *Aguilar v. Texas,*[11] held that where an informant's tip is central to a showing of probable cause, the affidavit in support of an application for a warrant must state "underlying facts and circumstances" showing the basis for the affiant's conclusions to "enable the magistrate to independently judge the validity of the . . .conclusions"[12] as to the existence of probable cause.[13] In the final area, particularity of description, most courts have

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[5]Stefanelli v. Minard, 342 U.S. 117 (1951) (Douglas dissenting); Wolf v. Colorado, 338 U.S. 25 (1949) (Douglas dissenting); Weeks v. United States, 232 U.S. 383 (1914).

[6]Wolf v. Colorado, 338 U.S. 25 (1949). The exclusionary rule of *Weeks* had been initiated through the Court's supervisory power over the federal courts as a procedural remedy and not through the fourth amendment itself.

[7]367 U.S. 643 (1961).

[8]The Supreme Court held that the exclusionary rule was inherent in the command of the fourth amendment. *Id.*

[9]U.S. CONST. *amend.* IV.

[10]Ker v. California, 374 U.S. 23 (1963). Reversing a California Supreme Court's decision as to reasonableness, *Ker* dealt with a warrantless search, but held that a search without a warrant is unreasonable per se unless occurring under special recognized exceptions. *See* Chimel v. California, 395 U.S. 752 (1969); United States v. Ventresca, 380 U.S. 102 (1965).

[11]378 U.S. 108 (1964). *Aguilar* dealt with an application based on informer's information. It prescribed a two-pronged test for "facts" and credibility. The "facts" requirement was created to facilitate review of probable cause. *See also* United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

[12]378 U.S. at 115.

[13]Although Mississippi adopted the exclusionary rule independently in Tucker v. State, 128 Miss. 211, 90 So. 845 (1922), it was based on the state's constitution (MISS. CONST. art. 3, § 23) rather than compliance with the fourth amendment of the United States Constitution. Thus development of reasonableness and probable cause in Mississippi originated from a different source than the federal standards. *Mapp, Ker,* and

held that a description is sufficient if the officers can with reasonable effort identify the specific place for which there is probable cause.[14] There is no requirement that the person in possession of the place be designated.[15] A warrant against a multi-occupant dwelling will usually be invalid if it fails to describe the particular sub-unit to be searched, however, a single warrant may cover several sub-units in a building if probable cause is shown for each.[16] Exceptions exist when a building contains space for several apartments, but is actually being used as one apartment;[17] if the premises are jointly occupied by several people and each has access to or control of the entirety;[18] or, if the entire premises are under suspicion.[19] These exceptions are to be determined by the magistrates and not by the officers executing the warrant.[20] Any overextension in the execution of the warrant is considered to be a violation of the law, even if it is accidental or made in good faith.[21]

In the instant case the court held that appellant's locked bedroom constituted a separate and distinct living unit, and that appellant was in possession of the room and exercised complete control over it. Although the court acknowledged a split of authority among the various jurisdictions which faced similar situations, it held that the characteristics of ownership present in the instant case were sufficient to consider the room to be in the appellant's private possession. The court concluded that the

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*Aguilar*, then, acted to supersede Mississippi decisions. O'Bean v. State, 184 So. 2d 635 (Miss. 1966). Two major examples of this are: (1) Until *Aguilar*, all that was needed to show probable cause was the statement that the applicant "has reason to believe and does believe" specified items are in a particular place. State v. Watson, 133 Miss. 796, 98 So. 241 (1932), and (2) Until *Aguilar*, the mere issuance of a warrant by the proper official was conclusive as to the existence of probable cause. Mai v. State, 152 Miss. 225, 119 So. 177 (1928); Loeb v. State, 133 Miss. 883, 98 So. 449 (1923). Because of this supersession, Mississippi cases must be carefully read for many will have little value in light of the changed standards.

[14]Steele v. United States, 267 U.S. 498 (1925); Hanger v. United States, 398 F.2d 91 (8th Cir. 1968); Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929).

[15]Hanger v. United States, 398 F.2d 91 (8th Cir. 1968); United States v. Bell, 17 F.R.D. 13 (D.D.C. 1955).

[16]United States v. Higgins, 428 F.2d 232 (7th Cir. 1970); United States v. Hinton, 219 F.2d 324 (7th Cir. 1955).

[17]Keiningham v. United States, 287 F.2d 126 (D.C. Cir. 1960).

[18]United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); People v. Gorg, 157 Cal. App. 2d 515, 321 P.2d 143 (1958).

[19]Minovitz v. United States, 298 F.2d 682 (D.C. Cir. 1962).

[20]Marron v. United States, 275 U.S. 192, 196 (1927).

[21]United States v. Hinton, 219 F.2d 324 (7th Cir. 1955). The Court stated it knew of no clause in the fourth amendment extending the authority of a search warrant in the event of unforeseen circumstances. It should also be added that for purposes of the fourth amendment, searching two apartments is the same as searching two separate houses. The word "place" when applied to an abode refers to a distinct living unit. United States v. Santore, 290 F.2d 51 (2d Cir. 1960). Such a unit is given the full protection of the fourth amendment. Lewis v. United States, 385 U.S. 206 (1966); Lanza v. United States, 370 U.S. 139 (1962).

officers needed probable cause separate from that which they possessed for that part of the apartment controlled by Acquisto, and in the absence of such proof, the evidence must be excluded.

Justice Sugg in a lengthy dissent[22] attacked the majority opinion by stating that neither the existing law nor any reasonable extension of such law required a separate showing of probable cause. Justice Sugg reasoned that since appellant occupied only one room in the apartment and used halls, bathroom, kitchen, and living room jointly with Acquisto, the room was an integral part of a single living unit occupied by two people, and should not be considered a separate living unit. Finally, Justice Sugg concluded that because it was impossible for the officers to have had prior knowledge of appellant's residence in the apartment, his room did not warrant the special status given it by the majority, and that the court should give controlling weight to cases which hold that where a multi-family unit has the appearance of a single-family unit, a search of the unit is legal.

The United States Supreme Court through its decisions in *Mapp v. Ohio*,[23] *Ker v. California*,[24] and *Aguilar v. Texas*,[25] did not put an end to the state laws of search and seizure. Rather, the court declared that the same standards of reasonableness and probable cause should apply to both state and federal activities, and carefully acknowledged the distinction between federal constitutional standards and a federal statutory standards.[26] The standard provided by the Constitution is the only standard binding upon the states and the states are free to develop their own additional standards. Generally the state standards represent a balance between local attitudes towards individual rights and the practical demands of local law enforcement. The vast substantive law imposed upon the states through these decisions and the expanding application of federal supervisory power make it difficult to determine where the federal realm ends and the states' begins.[27] In the instant case, the Mississippi Supreme Court determined that the pivotal question was whether or not the appellant's bedroom constituted a separate living unit.[28] Such a determination should be made according to state standards, for a decision would not violate the appellant's constitutional rights under federal standards.

With the opinion being couched in terms of "living unit," both the majority and the dissenting opinions are sound law. The dissent complies with the minimum constitutional standards while the majority applies a higher state standard.[29] In analyzing and comparing the two opinions

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[22]Justice Sugg wrote the dissent and was joined by Justice Robertson and Chief Justice Gillespie.

[23]367 U.S. 643 (1961).

[24]374 U.S. 23 (1963).

[25]378 U.S. 108 (1964).

[26]Ker v. California, 374 U.S. 23, 31 (1963).

[27]Lewis v. United States, 385 U.S. 206 (1966).

[28]If it was considered to be a separate unit, the search was illegal by law. If not, it fell within a well-recognized exception.

[29]States are always free to impose a higher standard than the Constitution requires. Cooper v. California, 386 U.S. 58 (1967).

it appears that the standard applied by the dissent provides for four requirements: (1) that the procedure to obtain the warrant must be in accordance with the constitutional standards as set out in *Aguilar;* (2) that the showing of probable cause must be substantively sufficient under constitutional standards; (3) that from the probable cause, the particular place to which it applies would be derived;[30] and (4) that if the description of the particular place were reasonably limited in light of the probable cause, then the allowable scope of the search would be the entire place described. The standard of the majority would be identical to that of the dissent except that the final requirement would be (4) . . . that the allowable scope of the search would be the entire place described limited by the allowable scope of the probable cause. The additional limitation of the majority opinion provides for a higher standard and for an added protection to individual privacy which would otherwise be rendered incidental to a physical description.[31]

Analysis of the majority opinion suggests that this further limitation is required, but there is little in the court's opinion to illustrate its application in the instant case, or to guide in its application in future cases. The blame lies in the deceptive terminology used by the court. The original test used by the United States Supreme Court centered around the terms "attributes of privacy of the home" and "the living unit."[32] Whether a person had an expectation of privacy under the old test was determined by the nature of the place where the person was located.[33] In *Katz v. United States,*[34] however, the Court rejected this "protected area" concept and instead offered an approach emphasizing personal privacy. The concept of *Katz* clearly provided that an area in which a person seeks to maintain his privacy may be protected, notwithstanding the physical nature of the area, if proper manifestations of a substantive expectation of privacy are present. The Court, however, failed to articulate a guiding rule as to what are proper manifestations of privacy.[35] Generally, two separate dwelling houses qualify for protection; yet areas occupied jointly generally do not. Separate homes may not be given protection if an opposite expectation is displayed. Likewise, an occupant of a bunkhouse may be able to preserve some private sanctuary, if the proper manifestations are made. As the reserved area narrows, naturally the manifestations must be greater, and perhaps there is a point where no manifes-

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[30]Probable cause and particularity of description are of equal importance and are usually discussed separately. Here, however, they are discussed together.

[31]Katz v. United States, 389 U.S. 347 (1967). *Katz* was mainly concerned with wiretapping, but it did dispell the "property interest" attached to search and seizure. Although this "property interest" mainly concerned trespass associated with a search, the case shows an attitude favoring personal protection. *Katz* stated the fourth amendment protected people, not places.

[32]*Id.* at 361; Mancusi v. Deforte, 392 U.S. 364 (1968); Lanza v. New York, 370 U.S. 139 (1962).

[33]82 HARV. L. REV. 95, 187 (1968).

[34]389 U.S. 347 (1967).

[35]82 HARV. L. REV. 95, 187 (1968).

tation is sufficient. Whatever the requirements, objective standards such as the "living unit" standard are abandoned and replaced with subjective ones.[36]

In the instant case, the court decided the appellant's locked bedroom constituted a separate "living unit."[37] The court does not explain why the bedroom should be considered separate except that it was occupied "under such circumstances as to make such person (appellant) the owner thereof." What "such circumstances" there were is not properly shown. Perhaps it was the fortuitous coincidence of a locked door, or the fact that Acquisto, the owner, did not have access to the room. Even if this were the case, there was no legal compulsion for the court to arrive at such a conclusion, and it is equally likely that the decision was based upon the natural human reaction to a locked door, *i.e.*, the occupant was requesting privacy. If the decision was based on this request for privacy, the court had to turn to the question of whether it was reasonable for appellant to expect his request to be honored.[38] The majority held that such a request was reasonable.

At present, there are two judicial approaches to search and seizure cases: the discarded "living-unit" test, and the more recent but as yet undefined "manifestations of privacy" approach. In the instant case, the Mississippi Supreme Court did not clearly follow either approach. While there are indications that the case was decided on the manifestations of privacy approach, the opinion is couched in terms of a "living-unit." Therefore, a certain amount of ambiguity surrounds the decision. The court could have avoided this ambiguity by committing itself to one approach, thereby establishing judicial guidelines to govern future cases. In the absence of such a commitment we are forced to await future decisions to determine which approach will be followed in Mississippi.

*Robert E. Warren*

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[36]*Id.*

[37]The court did not actually use the term "living unit." Instead the court approached the situation from the standpoint of ownership of the room. For the purpose of this note, the two are the same.

[38]The manifestation of an expectation of privacy and the reasonableness of that expectation is a two-pronged test suggested by Justice Harlan in his concurring opinion in Katz v. United States, 389 U.S. 347 (1967).

ESTATE AND GIFT TAXATION — LIFE INSURANCE — PROCEEDS TRANSFERRED IN CONTEMPLATION OF DEATH ARE FULLY INCLUDED IN ESTATE OF DECEASED

Appellee, the trustee for the estate of the deceased, contested the inclusion in the decedent's gross estate of the full value of the proceeds of a life insurance trust established by the decedent with his children as beneficiaries.[1] The trustee argued that since the decedent had never actually owned the policies, but had only provided funds which enabled the trustee to acquire them, only the funds transferred and not the total value of the policies could be included in the decedent's gross estate. The United States District Court for the Eastern District of Michigan accepted the trustee's reasoning and on motion for summary judgment held that only the sum transferred by the decedent to the trust was taxable in his estate. On appeal to the Sixth Circuit Court of Appeals, *held,* reversed. Payment of insurance premiums by an insured decedent within 3 years of his death on a policy on his life owned by a beneficiary is considered a transfer for purposes of the contemplation of death provision of the Internal Revenue Code rendering the proceeds of the policy fully includible in the decedent's gross estate. *Detroit Bank & Trust Co. v. United States,* 467 F.2d 964 (6th Cir. 1972).

Prior to the enactment of the Internal Revenue Code of 1954, life insurance proceeds were included in the gross estate of the insured if: (1) the insured's estate was the direct beneficiary of the policy; or (2) the insured held at his death incidents of ownership[2] in the policy exer-

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[1]Decedent had died within 6 months of transferring $9,600 to a life insurance trust to purchase a $100,000 policy on his life. Both parties stipulated that section 2035 of the 1954 Internal Revenue Code (Transfers in Contemplation of Death) was applicable, but they disagreed as to the amount to be included in the decedent's gross estate. The taxpayer argued that the includible amount should be limited to the $9,600 transfer to the insurance trust, while the government contended that the entire value of the insurance proceeds or $100,000 should be included. Treas. Reg. § 20.2035-1 (a) (1972), which gives the general application of the statute, reads as follows:

> (a) *In General.* A decedent's gross estate includes under § 2035 the value of any interest in property transferred by a decedent in contemplation of death within three years before his death, except to the extent that the transfer was for a full and adequate consideration in money or money's worth....

[2]Treas. Reg. § 20.2042-1 (c) (2) (1968) provides:

> Generally speaking, the term has reference to the right of the insured or his estate to the economic benefits of the policy. Thus, it includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

For examples of cases where sufficient incidents of ownership were found, *see* Farwell v. United States, 243 F.2d 373 (7th Cir. 1957) (right to change beneficiary); Liebmann v. Hassett, 148 F.2d 247 (1st Cir. 1945) (right to cash surrender value); Prichard v. United States, 255 F. Supp. 552 (N.D. Tex. 1966) (right to assign policy as security for a loan); Estate of Myron Selznick v. Comm'r, 15 T.C. 716 (1950), *aff'd,* 195 F.2d 735 (9th Cir. 1952) (right to cancel policies and obtain income from the cash surrender value); *cf.* Rev. Rul. 68-334, 1968 CUM. BULL. 403.

cisable either alone or in conjunction with any other person; or (3) the insured paid the premiums either directly or indirectly on a policy on his life owned by a beneficiary.[3] This final provision, known as the "premium payment test," provided that if the insured continued to pay the premiums on a policy which he did not own, the part of the insurance proceeds proportionate to the amount of premiums paid would be included in his gross estate.[4] With the enactment of section 2042 of the 1954 Internal Revenue Code,[5] Congress clearly repudiated the "premium payment test" and held that the payment of premiums could not in itself render the proceeds includible in the estate of the insured.[6] Nevertheless, problems arose with the transfer of life insurance policies which came under section 2035 (b) of the 1954 Internal Revenue Code. Under this section, the value of any interest in property transferred within 3 years of decedent's death is included in his gross estate.[7] The IRS was con-

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[3]Revenue Act of 1942, § 404, 56 Stat. 944, *codified in* INT. REV. CODE of 1939, § 811 (g).

[4]For example, if the total premiums paid on a $100,000 life insurance policy equalled $50,000, of which $30,000 had been paid by the insured, then $30,000/$50,000 x $100,000 or $60,000 would be included in the insured's gross estate. C LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 275 (2d ed. 1962).

[5]Treas. Reg. § 20.2042-1 (c) (1972) reads:

> *Receivable by other beneficiaries.* (1) § 2042 requires the inclusion in the gross estate of the proceeds of insurance on the decedent's life not receivable by or for the benefit of the estate if the decedent possessed at the date of his death any of the incidents of ownership in the policy, exercisable either alone or in conjunction with any other person. However, if the decedent did not possess any of such incidents of ownership at the time of his death nor transfer them in contemplation of death, no part of the proceeds would be includible in his gross estate under § 2042.

[6]The majority report of the House Ways and Means Committee justified the elimination of the "payment of premiums" test on the ground that property, other than life insurance, was not taxable to the decedent's estate if he had completely parted with it during his life, even though he had paid the consideration for such property. The report concluded that discrimination against life insurance in this manner was not justified. H.R. REP. No. 1337, 83d Cong., 2d Sess. A 316-17 (1954).

[7]Generally speaking, a transfer that qualifies for section 2035 treatment is a transfer made with a "death" motive. As Treas. Reg. § 20.2035-1 (c) (1972) provides:

> A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

The leading and most often quoted case considering this question is United States v. Wells, 283 U.S. 102 (1931), in which the Supreme Court stated that the dominant purpose of the tax on transfers in contemplation of death "is to reach substitutes for testamentary disposition and thus to prevent evasion of the estate tax...." *Id.* at 117. The Supreme Court has held that a transfer is made in contemplation of death only if the thought of death is the impelling cause of the transfer. Allen v. Trust Co., 326 U.S. 630 (1946). In the case of Johnson v. Commissioner, 10 T.C. 680 (1948), the

fronted with the problem of whether the payment of premiums alone would allow: (1) the inclusion of the amount of the premiums paid within the 3-year period of death; or (2) whether it would extend to include the part of the proceeds of the policy proportionate to the part of the premiums paid by the insured within 3 years of his death if the decedent outlived the assignment of the policy for 3 years, but continued to pay the premiums on the policy for a period within 3 years of his death. The IRS took the position that under the contemplation of death section, the mere payment of premiums within 3 years of the decedent's death made the payments includible in his gross estate and that a proportionate share of the total proceeds should be included in the gross estate.[8] In 1967 the IRS codified these contentions in Revenue Ruling 67-463[9] which stated that if the insured continued to pay the premiums after the transfer, a pro rata portion of the face value of a life insurance policy would be included in the decedent's gross estate even if he transferred the policy to the beneficiaries more than 3 years before his death. However, in *Gorman v. United States,*[10] the court found that the ruling was "unfounded in either statute or case law,"[11] and rejected the pro rata proceeds argument by holding that only the death-motivated premiums were includable in the decedent's estate as a proper application of section 2035. In *Estate of Inez Coleman,*[12] the Tax Court reiterated the holding in *Gorman* and held that "the frontiers of § 2035 should not be extended to include the proceeds of life insurance simply because a decedent paid the premiums."[13] In *First National Bank of Midland v. United States,*[14] the court rejected each case that the IRS had used in support of its 1967 ruling, concluding that there was no legislative or case-law support for inclusion of a pro rata share of the premiums. As a

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Tax Court enumerated various lifetime motives. The most important of these are: (1) decedent's desire to see his heirs realize the present enjoyment of a gift; (2) decedent's wish to free himself from any managerial duties which a present gift may entail; (3) decedent's good health at the time the gift is made. *See* Barry, *The Taxation of Transfers in Contemplation of Death,* 10 HASTINGS L.J. 370 (1959).

[8]The Service was basing its pronouncement on Treas. Reg. § 20.2035-1(e) (1972): "The value of an interest in transferred property includible in a decedent's gross estate under this section is the value of the interest as of the applicable valuation date."

[9]Rev. Rul. 67-463, 1967-2 CUM. BULL. 327. *See* 11 ARIZ. L. REV. 323 (1969); 44 NOTRE DAME LAW. 630 (1969); 43 TULANE L. REV. 882 (1969); 71 W. VA. L. REV. 199 (1969).

[10]288 F. Supp. 225 (E.D. Mich. 1968). *See* 82 HARV. L. REV. 1765 (1969); 67 MICH. L. REV. 812 (1969). The factual situation in *Gorman* is virtually identical to the present case.

[11]288 F. Supp. at 230.

[12]52 T.C. 921 (1969). In *Coleman,* the insured-decedent had transferred the policies more than three years before death. Only the premiums paid within three years of death were includible as transfers in contemplation of death.

[13]*Id.* at 924.

[14]423 F.2d 1286 (5th Cir. 1970).

result of these decisions, Revenue Ruling 71-497,[15] was issued revoking the 1967 ruling, and holding that if the policy was transferred more than 3 years before the decedent's death, only the premium payments were includable as transfers in contemplation of death. The ruling further stated, however, that if a decedent purchased a 1-year term policy on his life designating his children as beneficiaries and owners, and if he paid the premiums on the policy, the transfer would be fully includible in his gross estate. This 1-year policy inclusion was accepted by the Fifth Circuit Court of Appeals in *Bel v. United States*.[16] In *Bel* the court held that the entire proceeds of a 1-year accidental death policy were includable in the insured decedent's estate, and that section 2042 and the incidents of ownership test were totally irrelevant to a proper application of section 2035.[17]

Relying on the reasoning in both the *Chase National Bank v. United States*[18] and *Bel*[19] decisions, the court in the instant case ruled that the term "transfer" encompassed gifts made through expenditures by the decedent with the purpose of having property pass to another at his death. The court further found that "the trustee was in reality acting as the decedent's agent"[20] and that the trust device was simply a testamentary or will substitute. Looking to the Congressional intent behind the passage of section 2035, the court concluded that gifts transferred in

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[15]Rev. Rul. 71-497, 1971-2 CUM. BULL. 329.

[16]452 F.2d 683 (5th Cir. 1971).

[17]In *Bel*, the court reasoned that: (1) sections 2035 and 2042 are not interrelated in cases involving life insurance policies — section 2042 deals strictly with the transfer of life insurance and imposes the incidents of ownership test to it; section 2035 provides that all property transferred in contemplation of death is includible in the decedent's gross estate; (2) the decedent's paying of the premiums within the 3-year period gives him all rights, title and interest to the policy; (3) the term "transfer" includes property procured through expenditures of the decedent. In reference to the third item, the court relied heavily on the language in the 1929 Supreme Court decision of Chase Nat'l Bank v. United States, 278 U.S. 327 (1929), in which the constitutionality of the estate tax was upheld. The Supreme Court concluded in *Chase* that the estate tax was a tax imposed on the decedent's privilege of transferring property at his death:

> obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense to refer only to the passing of particular items of property from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

*Id.* at 337. *See, e.g.*, Milliken v. United States, 283 U.S. 15 (1931).

[18]278 U.S. 327 (1929).

[19]452 F.2d 683 (5th Cir. 1971). The court stated:

> We think our focus should be on the control beam of the word "transfer." The decedent, and the decedent alone, beamed the accidental death policy at his children, for by paying the premium he designated ownership of the policy and created in his children all of the contractual rights to the insurance benefits.

*Id.* at 691.

[20]Detroit Bank & Trust Co. v. United States, 467 F.2d 964, 969 (6th Cir. 1972).

contemplation of death should be valued "in terms of the transfer of the proceeds at death rather than at the purchase or premium cost,"[21] and that the entire proceeds should be included in the decedent's estate for estate tax purposes.

The instant decision, along with the more recent decision of *First National Bank of Oregon v. United States,*[22] should have a very significant effect upon the estate tax area. The significance is that the court found the *entire proceeds* of the life insurance policy to be includable under the contemplation of death provision of the treasury regulations. This should serve as a stern warning to estate planners that the "premium payment test" is alive and well, and if the insured provides the funds for the purchase of the policy, and dies within 3 years of the purchase, the entire amount of the proceeds will be included in his estate.[23] Estate planners, however, can avoid such unwelcome implications by planning appropriately. Whenever possible, the owner-beneficiary should be the original applicant of the policy. The insured should not handle any of the administrative duties involving the ownership of the policy, and, most importantly, the owner should pay all of the premiums for the first 3 years following the issuance of the policy.[24] Although the result and implications of the instant decision will cause the estate planner appreciable concern, it should also create a greater degree of certainty in this specific area of estate planning. The planner can now rely on the fact that where an insured-decedent transfers a policy to an owner-beneficiary more than 3 years prior to his death, the only amount which may be included in the insured decedent's gross estate are the actual premium dollars.

*Marlane Elizabeth Chill*

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[21]*Id.*

[22]No. 71-866 (D.C. Ore., September 8, 1972). This case was decided one week after *Detroit Bank & Trust.* The factual situation in the two cases is similar, except that in *First Nat'l Bank of Oregon,* the decedent had his wife take out the policies on his life. Although the wife was both the owner and beneficiary of the policies, the decedent paid all of the premiums. The decedent died within 3 years of the issuance date of the policies.

[23]For a good general background *see* C. LOWNDES & R. KRAMER, *supra* note 4, at 271.

[24]Eliasberg, *Contemplation of Death and the Estate Taxation of Life Insurance,* 111 TRUSTS AND ESTATES 690 (1972).

## Maritime Wrongful Death — Personal Injury Judgement Will Not Bar *Moragne* Death Action

Libellant[1] filed an action in admiralty under the general maritime law for the wrongful death of her husband[2] who had died as a result of injuries sustained while aboard defendant's vessel which was located in the inland waterways of Louisiana. Defendant contended that the action was barred because the deceased, prior to his death, had recovered a judgment in a personal injury suit[3] based on the same injury which ultimately resulted in his death.[4] The trial court sustained defendant's motion for dismissal on the grounds of res judicata and failure to state a claim upon which relief could be granted. On appeal to the Fifth Circuit

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[1]Libellant brought this action as administratrix of the deceased's estate on behalf of herself as widow of the deceased.

[2]Libellant's husband was a longshore foreman and was injured while directing the loading of cargo on defendant's vessel.

[3]A recent amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902 (1970), has significantly limited the rights of a longshoreman to bring suit against a vessel (or its owners) for injuries sustained while performing stevedoring operations on the vessel. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1251. Prior to the amendment, a longshoreman injured on a vessel could recover compensation from his stevedore employer under the Longshoremen's and Harbor Workers' Compensation Act and, in addition, maintain a third-party action against the vessel (or its owners) for damages attributable to negligence *or* an unseaworthy condition of the vessel. Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1946). The amendment will allow the longshoreman to bring a third-party action against the vessel for *negligence*, but not for *unseaworthiness* (a form of absolute liability).

The personal injury action in which the deceased longshoreman in the instant case recovered a judgment was brought prior to enactment of this amendment; however, it represents the type of action which will now be prohibited. The deceased longshoreman recovered for his personal injuries on the grounds of an *unseaworthy* condition of the vessel. If the amendment had been in force, the longshoreman would have been limited to his exclusive remedy under the Longshoremen's and Harbor Workers' Compensation Act unless he could establish *negligence* on the part of the vessel (or its owners).

A close reading of the amendment, however, indicates that the beneficiaries of a deceased longshoreman may not be precluded from bringing a *death action* against the vessel on the grounds of *unseaworthiness,* although the intention of the Congress may have been otherwise. The subsection within which the unseaworthiness basis of liability is withheld makes specific reference to a personal injury action, but fails to mention a death action. This fact is in contrast to the immediately preceding subsection (involving the exclusive liability of the employer under the Act) which specifically refers to injury *or* death and enumerates the next of kin who would receive death benefits. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1251.

[4]The deceased died 10 days after the favorable judgment in the personal injury action, and his wife was substituted as widow and administratrix of the estate to respond to post-trial motions and the subsequent appeal. Stein v. Sea-Land Services, Inc., 440 F.2d 1181 (5th Cir. 1971). The judgment was ultimately satisfied by payment to the estate.

Court of Appeals, *held,* reversed. A wrongful death action under the general maritime law is not barred by a prior judgment recovered in a personal injury suit brought by the decedent prior to his death. *Gaudet v. Sea-Land Services, Inc.,* 463 F.2d 1331 (5th Cir. 1972).

English maritime law did not recognize an action for wrongful death in the absence of a statute providing such remedy.[5] In the formative years of American admiralty common law several lower federal courts allowed maritime death actions without reliance on a statute,[6] but in 1886 the Supreme Court adopted the English maritime law by holding in *The Harrisburg*[7] that a wrongful death action does not exist in the common law of admiralty in this country. With no federal statute on which they could rely, the courts attempted to provide some remuneration for maritime deaths by extending the various state death statutes to the navigable waters.[8] In response to growing discontent with this situation, Congress enacted the Death on the High Seas Act[9] and the Jones Act[10] in 1920 and the Longshoremen's and Harbor Workers' Compensation Act[11]

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[5]Seward v. The Vera Cruz, 10 App. Cas. 59 (1884). The English common law rule that no civil death action shall lie in the absence of legislative directive had already been established in Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), and the original death statute, The Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93, §§ 331-36 (commonly referred to as Lord Campbell's Act), had been enacted. The court said that the English maritime law does not differ from the common law with respect to the absence of a right of action for deaths resulting from tortious acts, and the right established by Lord Campbell's Act does not encompass maritime deaths.

[6]*See, e.g.,* The Columbia, 27 F. 704 (S.D.N.Y. 1886); The Sea Gull, 21 F. Cas. 909 (No. 12578) (C.C.D. Md. 1865); Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform,* 64 COLUM. L. REV. 648, 649 & n.7 (1964). The cases reasoned that a contrary holding should be adopted in American maritime law because admiralty is not bound by the common law of the land and that the reasons supporting the common law rule are not present in admiralty. *See* Hughes, *Death Actions in Admiralty,* 31 YALE L.J. 115, 116 (1921).

[7]119 U.S. 199 (1886). Eight years prior to this decision the Supreme Court held that no civil action for wrongful death lies in the common law of this country. Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1878). In both *Brame* and *The Harrisburg* the Court adopted the English rules more out of deference to the weight of precedent than reliance on any underlying rationale. *See* Smedley, *Wrongful Death — Bases of the Common Law Rules,* 13 VAND. L. REV. 605 (1960).

[8]The Hamilton, 207 U.S. 398 (1907). An excellent discussion of the development of and problems encountered from borrowing a state death statute can be found in George & Moore, *Wrongful Death and Survival Actions Under the General Maritime Law: Pre-Harrisburg Through Post-Moragne,* 4 J. MAR. L. COMM. 1, 5-8 (1972).

[9]46 U.S.C. §§ 761-68 (1970).

[10]46 U.S.C. § 688 (1970) [commonly referred to and hereinafter cited as the Jones Act]. This act incorporates by reference the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 52-60 (1970), thereby extending to seamen the rights of recovery for injury and death afforded to railroad employees by FELA.

[11]33 U.S.C. §§ 901-50 (1970).

in 1927. Although these statutes provided a remedy for certain maritime deaths, the scope of each was limited by situs, status of decedent, or theory of liability.[12] Several situations ultimately arose where potentially valid death actions were found to be outside the restricted circumstances provided by these statutes or any state statutes which might be available.[13] These inconsistencies and inequities eventually led to the overruling of *The Harrisburg* decision in 1970 in the landmark case of *Moragne v. States Marine Lines, Inc.*[14] *Moragne* held that a wrongful death action does in fact lie under the common law of admiralty,[15] but the Court refrained from deciding the specific limitations and situations in which this right is actionable.[16] Instead the Court said that the lower courts should look to the existing federal and state death statutes, and the cases construing them, in deciding these issues.[17] No specific reference was made to the effect that a recovery in a personal injury suit prior to death might have on the right to bring this newly-created action, and no reported case since *Moragne* has decided this issue. Similarly, no reported case has decided the issue when the death action is brought under the Death on the High Seas Act. Courts have held, however, that compensation for injuries under the Longshoremen's and Harbor Workers' Compensation

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[12]The Death on the High Seas Act provides a right of recovery for the death of *any* person under the theory of *negligence* or *unseaworthiness.* Chermesino v. Vessell Judith Lee Rose, Inc., 211 F. Supp. 36 (D. Mass. 1962), *aff'd,* 317 F.2d 927 (1st Cir. 1963), *cert. denied,* 375 U.S. 931 (1963). The injury resulting in the death must also occur on the high seas, *i.e.,* beyond a marine league (3 miles) from shore. 46 U.S.C. § 761 (1970).

The Jones Act provides an action only for the death of a seaman and only if the wrongful acts which caused the death amount to *negligence.* 46 U.S.C. § 688 (1970).

The limited death benefits under the Longshoremen's and Harbor Workers' Compensation Act were restricted to longshoremen and harbor workers whose death resulted "from an injury occurring upon the navigable waters of the United States (including any drydock) . . . ." 33 U.S.C. § 903 (1970). The injury must arise out of and in the course of employment. 33 U.S.C. § 902(2) (1970).

[13]The expansion of the unseaworthiness doctrine to a form of strict liability was instrumental in creating some apparent inequities and inconsistencies. G. GILMORE & C. BLACK, THE LAW OF ADMIRALITY 315-32 (1957). Unseaworthy "defects" causing deaths which would be sufficient to recover under the Death on the High Seas Act were frequently found not actionable within a marine league from shore when the borrowed state death statute did not include unseaworthiness as a ground of recovery. In addition, the beneficiaries of a deceased *seaman* had to prove *negligence* under the *exclusive* remedy in the Jones Act ( whether the normally available state death statute included unseaworthiness as a ground of recovery or not). *See* Comment, *Wrongful Death on State Waters: A Remedy Under General Maritime Law,* 44 TEMP L.Q. 292 (1971).

[14]398 U.S. 375 (1970).

[15]*Id.* at 409.

[16]*Id.* at 405-08.

[17]*Id.*

Act will *not* bar a subsequent award of death benefits.[18] Although no case has decided a similar issue when the death action is brought under the Jones Act, the Supreme Court has held that a settlement and release by the employee *will bar* a subsequent death action under the Federal Employers' Liability Act[19] (which the Jones Act incorporates by reference[20]). Looking to state statutes and decisions, the majority rule in land law *bars* a death action when the decedent, prior to his death, has recovered a judgment for his injuries.[21]

In the instant case the court observed that although the majority rule in land law barred a death action when the decedent had previously recovered damages in a personal injury suit,[22] a "substantial number" of those decisions "were based on 'survival-type' rather than 'true' wrongful death statutes."[23] The court noted that the elements of damages sought in each are diverse—in the former, damages to the deceased; in the latter, damages to the beneficiaries.[24] The court reasoned that the prior recovery

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[18]Hitt v. Cardillo, 131 F.2d 233 (D.C. Cir. 1942); Norton v. Travelers Ins. Co., 105 F.2d 122 (3d Cir. 1939); International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2d Cir. 1938). *See also* Hill v. Arrien, 336 F. Supp, 799 (E.D. Pa. 1972) (holding that a recovery by the decedent's estate under Pennsylvania's "survival" statute should not be set off against or bar the widow's subsequent claim for death benefits under the Longshoremen's and Harbor Workers' Act).

[19]Mellon v. Goodyear, 277 U.S. 335 (1928). *See also* Flynn v. New York, N.H. & H.R.R., 283 U.S. 53 (1931) (holding that since the statue of limitations had run on the employee's right of action for injuries prior to his death, the death action under FELA was also extinguished); Walrod v. Southern Pac. Co., 447 F.2d 930 (9th Cir. 1971) (holding that judgment awarded as compensation for injuries bars a subsequent death action under FELA).

[20]*See* discussion, *supra* note 10.

[21]Annot., 39 A.L.R. 579 (1925); Comment, *Wrongful Death Damages in North Carolina,* 44 N.C.L. REV. 402, 405 (1966).

[22]Both parties in the instant case conceded that the majority rule in land law would bar the death action.

[23]Gaudet v. Sea-Land Serv., Inc., 463 F.2d 1331, 1333 (5th Cir. 1972). Theoretically, a "survival" action and a "true" death action are distinctly different. The former merely preserves for the decedent's estate any right of action the decedent would have had prior to death; the latter *creates* for the beneficiaries of the decedent a *new* cause of action for the loss they have sustained because of the death. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 126-27 (4th ed. 1971); Killion, *Wrongful Death Actions in California: Some Needed Amendments,* 25 CALIF. L. REV. 170 (1937).

[24]The court noted specific elements of damages which have thus far been recognized in *Moragne* death actions which are peculiarly personal to survivors of the decedent; *e.g.,* survivor's grief, funeral expenses, loss of society and companionship, and loss of consortium. The fact that these elements of damages are not generally allowed under statutory death actions (to include the federal maritime statutes) may have influenced previous decisions of the particular issue presented in the instant case.

by the decedent for his damages would extinguish a "survival" action for those same damages, but should not bar the separate and distinct right of the beneficiaries to recover under a "true" death action damages which *they* sustained because of the death.[25] The court also noted that the majority interpretation of the language of the original death statute, Lord Campbell's Act, is that the decedent must have a viable cause of action at the time of his death, and that since a prior recovery would extinguish his rights, this prerequisite could not be met. The court rejected this theory in favor of the minority interpretation that the language merely required that the original wrongful act give rise to an actionable tort, whether pursued to recovery or not. The court reasoned that the maritime death action created in *Moragne* favors the admiralty policy of extending a remedy where there is no express legislative direction excluding it. The court further reasoned that a contrary holding would place an injured man in the precarious position of seeking recovery for his personal injuries "only at the risk of sacrificing his beneficiaries' action should he die." Since admiralty law is not constrained to follow land law, the court concluded that a rule *allowing* a death action under general maritime law subsequent to a recovery for personal injuries more closely follows both the intent expressed by the Supreme Court in *Moragne* and the better reason and logic.

Although the instant case is one of first impression for the maritime death action created in *Moragne,* the court was not faced with a novel question. Both the English and American courts have been struggling with this and similar issues since the enactment of the original death statute, Lord Campbell's Act, and the plethora of variations which followed. The court, however, recognized two new aspects involved in the instant case which were alluded to in the *Moragne* decision but were either not available or not applied in the earlier cases. First, the decision did not rest upon an interpretation of the inflexible wording of a statutory enactment, a fact which was universally present prior to *Moragne.* Secondly, admiralty law is not constrained to follow the rules promulgated in land law, a fact which was known but not noticeably applied in admiralty cases involving wrongful death prior to *Moragne.* The court wisely used these tools to extricate the *Moragne* death action from the clutches of Lord Campbell's Act. By holding that the existence of an actionable right personal to the deceased at the moment of death is not a sine qua non to the existence of the death action, the court impliedly rejected other defenses in addition to the recovery of a personal injury judgment. This includes a compromise and release executed by the decedent prior to his death or the abatement of decedent's personal injury action under the doctrine of laches. In other words, the action or inaction by the decedent subsequent to his injury and prior to his death should

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For an excellent discussion of the elements of damages which have been thus far allowed in *Moragne* death actions in the various jurisdictions *see* George & Moore, *supra* note 8, at 19-22.

[25]The court noted that the elements of damages recovered in the personal injury action which overlap with elements of damages generally allowed in death actions (*e.g.,* loss of earnings or support) should be deducted to avoid double recovery.

not affect the separate and independent death action of the beneficiaries. The court, however, must still look to the effect which the traditional principles of res judicata and collateral estoppel might have upon the case. Since the *Moragne* death action was construed to be a separate and independent cause of action personal to the beneficiaries, the doctrine of res judicata is inapplicable.[26] Collateral estoppel, however, may play an extremely important role since both the personal injury action and the death action are based on the same wrongful acts.[27] For example, in the instant case the defendant should be estopped from relitigating whether his alleged wrongful acts created liability since this fact was actually litigated and found to be present in the personal injury action.[28]

*James Blackburn, Jr.*

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[26]In order for res judicata to apply the second suit must be based on the same cause of action and be between the same parties or their privies. Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).

[27]Parties to one cause of action may be estopped from relitigating in a second cause of action common issues which were actually contested and determined in the first suit. *Id.*

[28]It is interesting to note, however, that if the court found in the personal injury action that the defendant's acts did not create liability, the beneficiaries should *not* be estopped from again raising this issue in a subsequent death action. Estoppel only runs against the parties and their privies to the first cause of action. Since the beneficiaries did not have an opportunity to be heard in the personal injury action, that right should be afforded to them in the death action.

## Parties — Class Actions — Action Fails for Lack of Ascertainable Class and Community of Interest

Appellant, a ticket holder to a closed-circuit boxing match, brought a class action suit against the promoters of the closed-circuit showing, alleging breach of contract and breach of implied warranty, and seeking monetary damages on behalf of himself and all others who attended the showing.[1] Appellant contended that a class action is permitted under Mississippi law and that he was representative of a class too numerous to join as parties.[2] Respondents moved to dismiss the action on grounds that such a suit could not be brought in Mississippi as a class action,[3] since the appellant's alleged remedy was in law, not equity. The chancery court adopted respondent's position and entered a decree dismissing the action. On appeal to the Mississippi Supreme Court, *held,* affirmed. Ticketholders of sporting events who have tickets which may differ in price, do not possess the fundamental prerequisites for a class action since there is neither an ascertainable class nor a common interest in the suit. *Barrett v. Coullet,* 263 So. 2d 764 (Miss. 1972).

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[1]Suit was brought in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and was the result of poor audio and visual reception at the Mississippi Coliseum in Jackson, Mississippi, prior to and during the world championship bout between Joe Frazier and Muhammed Ali on March 8, 1971. Appellants asserted that the preliminaries and first three rounds of the boxing match were neither seen nor heard, that only the audio portion was presented for the fourth and fifth rounds, and that the visual portion of the remaining rounds was "extremely blurred and hazy" resulting in a breach of an implied warranty that both visual and audio parts of the sporting event would be of an acceptable quality.

[2]The Bill of Complaint reads as follows:

> Complainant, John W. Barrett, brings this action on behalf of his class because the class he represents is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the members of the class, the claim of the said complainant is typical of the claims of the other members of his class, and an adjudication with respect to the said complainant would as a practical matter be dispositive of the interests of the other members of the class he represents.
>
> Complainant's allegation seems to justify a class action in federal court under FED. R. CIV. P. 23 (b)(3).

[3]The facts are not clear as to complainant's choice of forum. If respondents had met federal jurisdictional requirements, their class action would probably be allowed under rule 23 of the Federal Rules of Civil Procedure. The parties' residence, though unknown, is irrelevant in the present case, for such an action cannot be brought in federal court under diversity jurisdiction because the separate and distinct claims of the plaintiffs cannot be aggregated to provide the $10,000 minimum. *See* Snyder v. Harris, 394 U.S. 332 (1969); FED. R. CIV. P. 23. The fact that this action could not be brought in federal court demonstrates the need for a similar remedy in state actions which meet the 23 (b) (3) federal requirements but do not meet jurisdictional requirements of residency or $10,000 minimum limitation.

Class suits were first recognized in equity by 18th century English courts which formulated the action to avoid inconvenience[4] and injustice to the parties.[5] Equity courts used the class action suit as an exception to the rule requiring that all parties to a suit be brought before the court.[6] As a result American courts of equity adopted this action, permitting it where there were parties too numerous to join and where the party before the court was an adequate representative of absent parties.[7] In addition, the early American courts required that there be a community of interest, in law and fact, between the members of the class and refused to allow the class suit in equity unless the cause of action itself was cognizable in equity.[8] Most jurisdictions saw a need for less stringent standards where

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[4]Adair v. New River Co., 32 Eng. Rep. 1153 (Ch. 1805), wherein the court affirmed the doctrine of class representation by stating "[it is] not, that it is inexpedient, but, that it is impracticable, to bring them all. . . ." *Id.* at 1159. *See, e.g.,* Cousins v. Smith, 33 Eng. Rep. 397 (Ch. 1807).

[5]Vernon v. Blackbury, 26 Eng. Rep. 491 (Ch. 1740), wherein the court, citing the *Bubble Case* of 1720 (unreported), states that "to avoid inconvenience from making such numerous parties, this court restrained them to those particular persons who were intrusted with this general power." 26 Eng. Rep. at 491. However, *Vernon* ruled contra to the *Bubble Case* and would not allow one man (the treasurer) to represent all commissioners for building 50 new churches. *See, e.g.,* Meux v. Maltby, 36 Eng. Rep. 621 (Ch. 1818).

[6]Chancey v. May, 24 Eng. Rep. 265 (Ch. 1722), wherein the court allowed the present officers to sue on behalf of all other past officers and stockholders (800) except the defendants who had embezzled funds from the firm. One of the reasons for allowing the suit was "because it would be impracticable to make all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties." *Id. See, e.g.,* Lloyd v. Loaring, 31 Eng. Rep. 1302 (Ch. 1802); City of London v. Richmond, 23 Eng. Rep. 870 (Ch. 1701) (900 plaintiffs were allowed an action against an assignee of a lease for water). For other cases listing additional reasons for class actions *see* 3 B. MOORE, FEDERAL PRACTICE § 23.02(1) (2d ed. 1950).

[7]In Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), the Supreme Court sets forth the following requirements for a class action:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being equally before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

*Id.* at 303. *See also* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); Bacon v. Robertson, 59 U.S. (18 How.) 480 (1855).

[8]The essential elements of the community of interest claim have been contested since 1892 when Chief Justice Campbell delivered the opinion in Tribbette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892), which attacked the view presented in 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 255-57, 268-69 (2d ed. 1892, 3d ed. 1905, 4th ed. 1918, 5th ed. 1941) [hereinafter cited as POMEROY]. Pomeroy's view was that in

the parties were so numerous that the compulsory joinder rule deprived them of an adequate remedy at law and, consequently, adopted standards which required only a common question of law or fact to maintain a class action.[9] Mississippi, however, held to the original requirement that there must be some independent ground of equity jurisdiction before a class suit could be maintained in a court of equity.[10] In 1892 the Mississippi Supreme Court, in the landmark decision of *Tribbette v. Illinois*,[11] gave emphasis to these requirements by stating:

> [T]here must be some recognized ground of equitable interference in the subject matter of the controversy, or common right of title involved, to warrant the joinder of all in one suit; or there must be some common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a community of interest merely in the question of law or of fact involved.[12]

As the various states combined their courts of law and equity, the problem of ascertaining legal or equitable relief for class actions became less important. In 1912 the Supreme Court set forth certain requirements for class action suits,[13] yet it did not specify that there be an independent cause of action cognizable in equity.[14] In 1938 the federal courts of law and equity were combined, thereby establishing a federal class action at

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order to prevent a multiplicity of suits, a class action may unite in one suit all who have a common interest in the same questions of fact and law. Chief Justice Campbell, in denouncing Pomeroy's view, stated that no such doctrine exists and pointed out that no community of interest exists if "the suit is for that not in itself a matter for equity cognizance." 70 Miss. at 182, 12 So. at 32. *See, e.g.*, Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932); Fletcher, *The Jurisdiction of Equity Relating to Multiplicity of Suits*, 24 YALE L.J. 642 (1914); Kimbrough, *The Tribbette Case*, 12 Miss. L.J. 134 (1939) [hereinafter cited as Kimbrough].

> [9]Notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised. . . where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy.

POMEROY, *supra* note 8, at § 269. *Accord*, Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953); First State Bank v. Chicago R.I. & P.R.R., 63 F.2d 585 (8th Cir. 1932); Osborne v. Wisconsin Cent. R.R., 43 Fed. Rep. 824 (C.C.W.D. Wis. 1890).

[10]Mississippi was not the only jurisdiction to follow this doctrine. *See, e.g.*, Pioneer Pyramid Life Ins. Co. v. Hughey, 76 F.2d 524 (4th Cir. 1935); Broderick v. American Gen. Corp., 71 F.2d 864 (4th Cir. 1935); Pacific Mut. Life Ins. Co. v. Parker, 71 F.2d 872 (4th Cir. 1934); Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931); Watson v. Huntington, 215 Fed. Rep. 472 (2d Cir. 1914).

[11]70 Miss. 182, 12 So. 32 (1892).

[12]*Id.* at 188, 12 So. at 32, 33.

[13]Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921).

[14]*See, e.g.*, ARK. STAT. ANN. § 27-809 (1947) (former federal rule); CAL. CIVIL CODE § 382 (Supp. 1972) (adopts new federal rule); PA. R. CIV. P. 2230 (1972) (new federal rule).

law.[15] Many states followed suit by passing similar statutes permitting a class action in law patterned after the Federal Rules of Civil Procedure,[16] and today all but six states have some form of a class action statute.[17] In 1966 the federal rule was again revised, resulting in a continuance of the lenient requirements for class suits in federal courts.[18] Mississippi, however, continues to follow the law as established in *Tribbette*.[19]

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[15]C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72 (2d ed. 1970).

[16]These jurisdictions include: Mississippi; New Hampshire, Monitor Pub. Co. v. Hill, 173 A.2d 725 (N.H. 1961); Rhode Island, Vernon v. Reynolds, 20 R.I. 522, 40 A. 419 (1898); Tennessee, Covert v. Nashville, C. & St. L. Ry., 186 Tenn. 142, 208 S.W.2d 1008 (1948); Vermont, Dewey v. St. Albans Trust Co., 60 Vt. 1, 12 A. 224 (1888); and Virginia O'Hara v. Rittston Co., 186 Va. 325, 42 S.E.2d 269 (1947).

[17]Ashe, *The Class Action: Solution for the Seventies,* 7 NEW ENG. L. REV. 1 (1971) [hereinafter cited as Ashe].

[18]FED. R. CIV. P. 23 (a) states the prerequisites to a class action:

> One or more members of a class may sue . . .on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties will fairly and adequately protect the interests of the class.

*See* Eisen v. Carlisle & Jacquelin, 391 F. 2d 555 (2d Cir. 1968), wherein a class action was instituted by an odd-lot dealer on behalf of all other purchases and sellers of odd lots on the New York Stock Exchange. The court allowed the action and stressed the liberal interpretation of Rule 23. *See also* Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1965); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966).

[19]Mississippi has occasionally deviated from the logic of *Tribbette*, and such deviations can be divided into those before and those after the *Tribbette* case. Before *Tribbette, see* Crawford v. Mobile, J. & K.C.R.R., 83 Miss. 708, 36 So. 82 (1904); Illinois Cent. R.R. v. Garrison, 81 Miss. 257, 32 So. 996 (1902); Pollock v. Okolona Sav. Inst., 61 Miss. 293 (1883). However, it has been argued that each of these cases can be distinguished in that they did, in fact, require equitable relief. *Garrison* involved a constantly recurring injury; *Crawford* sought equitable relief even though it was not mentioned in the court's opinion. *See* Kimbrough, *supra* note 8, at 46-47. For post-*Tribbette* cases, *see* Whitlock v. Yazoo & M.V.R.R., 91 Miss. 779, 45 So. 861 (1907); Blumer v. Ulmer, 44 So. 161 (Miss. 1907); Thames v. Manfur, 87 Miss. 575, 40 So. 327 (1906); Tisdale v. Insurance Co. of N. Am., 84 Miss. 709, 36 So. 568 (1904). The *Tisdale* case was subsequently overruled by Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912), and Mississippi has not again deviated from the logic of *Tribbette*. *See e.g.,* Kimbrough, *supra* note 8, at 149-56; POMEROY, *supra* note 8, § 264 (a) at 479 n.20; Chafee, *Bills of Peace with Multiple Parties,* 45 Harv. L. Rev. 1297 (1932). The courts, in commenting on *Tribbette* have said:

> It has become a part of the warp and woof, a part of the very fiber of our law on the subject of the jurisdiction of equity cases involving a multiplicity of suits. It will doubtless remain embedded in our law for generations to come.

Kimbrough, *supra* note 8, at 50. *See also,* Miller v. White, 160 Miss. 32, 133 So. 144 (1931); Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 103 Miss. 816,

In the present case the Mississippi Supreme Court, noting that Mississippi has no statute pertaining to class actions, relied on past decisions and on the common law of equity for guidance.[20] The court held that even though a class action would be permitted in equity in Mississippi, it should only be permitted in clear cases[21] where there is a well-defined community of interest and an ascertainable class.[22] The court concluded

60 So. 1010 (1913); Newton Oil & Mfg. Co. v. Sessums, 102 Miss. 181, 59 So. 9 (1912); Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912).

Mississippi has recently held that there must also be an ascertainable class, but this requirement has always been necessary for class suits. The instant case is the first Mississippi case specifying the requirement of an ascertainable class. The court cites 59 AM. JUR. *Parties* § 55 ( 1971) which cites three California cases: Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Reptr. 612 (1968); Daar v. Yellow Cab. Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Reptr. 724 (1967); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 883, 198 P.2d 514 (1948). *Weaver* disallowed a class action seeking statutory damages for breach of contract brought on behalf of several hundred people who were refused admission to the Rose Bowl. The court stated that the class lacked community of interest and also established the requirement of an ascertainable class. The *Daar* case allowed a class action on behalf of all persons who had used Yellow Cabs for recovery of the cabs' overcharges. The court stated that the presence of an ascertainable class is dependent on the community of interest, thereby reducing in importance the latter requirement. *Gerhard* reinforced the *Daar* decision by holding that the ascertainable class depended upon the community of interest among class members in questions of law and fact involved. Summarily, the determining factor in ascertaining the existence of a class is the existance of related matters of fact and law. Those persons possessing related matters of fact and law are the ascertainable class and should be entitled to bring a class suit. For cases which were determined to have an ascertainable class *see* Chance v. Superior Ct., 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Reptr. 761 (1962); Fanucchi v. Colberly-West. Co., 151 Cal. App. 2d 72, 311 P.2d 33 (1957); Moore v. Bowes, 8 Cal. 2d 162, 64 P.2d 423 (1937); Farmers & Merchants Nat'l Bank v. Peterson, 5 Cal. 2d 601, 55 P.2d 867 (1936). For unascertainable classes *see* Czap v. Credit Bureau, 7 Cal. App. 3d 1, 86 Cal. Reptr. 417 (1970). *See also* CAL. CIV. PRO. CODE § 382 (West Supp. 1972).

[20]*See, e.g.,* Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825); Floreen v. Saucier, 200 Miss. 428, 27 So. 2d 557 (1946); McPike v. Wells, 54 Miss. 136 (1876). Although Mississippi does not have a statute authorizing class action suits, it does have a law providing attorney's fee for such suits. MISS. CODE ANN. § 1583.5 (1956) reads:

> Where a party hereafter institutes a suit for the benefit of himself and all others similarly situated, and thereby there is in such suit recovered or preserved property or a fund for the common benefit, the chancery court may make allowance to such party of the reasonable costs incurred, which costs shall include the necessary disbursement, and reasonable solicitor's fees, out of the property recovered or preserved for the common benefit.

[21]The court pointed out that class suits, by their very nature, are susceptible to close scrutiny. Including in one suit all parties similarly situated removes forever those individual rights and liablities from further judicial proceedings, binds even non-appearing parties to one judgment, eliminates the day in court for each aggrieved party, and denies those individuals their rights to due process and equal protection of the law. *See* City of Lakeland v. Chase Nat'l Co., 159 Fla. 783, 32 So. 2d 833 (1947).

[22]Cases cited note 19 *supra.*

that for the complainant to bring suit for all absent parties "would just go against the grain of 'due process' and 'equal protection' of the law" and that there was no ascertainable class or well-defined community of interest. The tickets were bought and sold at different times and at different prices and the seats were located in a different proximity to the screen. In addition the court held that breach of contract and breach of implied warranty were actions that would normally be brought in a court of law, not a court of equity.

In the instant case the court continued to interpret the requirements for a class action suit strictly, emphasizing the possible infringement of rights of individual members of the injured class who would be parties to the suit. The court reasoned that to allow the class action would deprive class members of the right *not* to sue, and might cause a member to be bound by a judgement without having his day in court to assert any different claim or defense which he alone might possess.[23] Yet, in attempting to protect the individual, the court may have done him an injustice, for if his damages are small, it may not be pecuniarily feasible for him to individually seek justice. Moreover, in other jurisdictions, recent decisions have provided more lenient standards for class action suits, and the logic of these decisions should minimize the concern of this court for the individual party.[24] For example, if the individual member of a class knows of the suit but wishes not to sue, he may either withdraw from the case or choose not to collect any damages that might be assessed by the court.[25] Also, the mere presence of a remedy outside equity does not always mean that there are separate defenses or damages, and even if the parties possess separate defenses or damages, it is not essential that the cases be tried separately, for the defenses or damages may be so closely related that they can be adjudicated in one action.[26] If there are no defenses, and damages are easily proved by ascertaining the cost of a ticket, then lack of an equitable remedy should be no bar to a class action. If damages are difficult to prove, yet there is still a common question of law and fact, there can be separate trials for damages and a joint trial on liability. Lack of an easy method to determine the distribution of damages is certainly no bar to a class action.[27]

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[23]*See, e.g.*, 21 HARV. L. REV. 208 (1907); 6 MISS. L.J. 434 (1934); 24 VA. L. REV. 925 (1938).

[24]*See* Boddie v. Connecticut, 329 F. Supp. 844 (D. Conn. 1971) (A suit was brought on behalf of all women in Connecticut who were too poor to pay court fees and costs incident to divorce proceedings. Denial of equal protection). *See also*, Daniel v. Paul, 395 U.S. 298 (1969) (suit brought by a group of blacks who were excluded from a club in Arkansas); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[25]The only instance where the individual might be prejudiced would be where he was a member of the class but didn't know of the suit. He would therefore be bound by the decision.

[26]In Federal court the class suit is still allowed even though damages are separately proven for each member. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal 1967). *See also* Bonde v. Stern, 73 N.D. 273, 14 N.W.2d 249 (1944).

[27]In contrast to the present case, *see* American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969), where the court allowed a class

The court stated that to allow the class action "would just go against the grain of due process and equal protection of the law." Yet what could go against the grain of due process and equal protection more than to *deny* a class action where a person could not otherwise bring suit because of economic reasons? In the instant case an individual could easily be in such a position, for court costs and attorney fees alone would greatly exceed any compensatory damages that he might receive.

The court's overly strict interpretation of the requirements for a class action severely and unnecessarily restricts the use of class actions in Mississippi. A class suit should not be denied simply because the parties paid different prices for their tickets, or because the parties' seats were in different locations. Furthermore, if the court's logic were applied to a similar situation where none of the closed circuit match had been shown, then a class made up of ticket holders would suffer more severe injuries but have no remedy whatsoever. Their small claims would not merit separate adjudication and under the court's standard they would have neither a common interest in law and fact nor an ascertainable class. False advertising, breach of contract, and breach of warranty might well become a profitable business if the courts refuse to allow class suits for such cases. Perhaps the court's complaint is not the ascertainability of the class, but rather its manageability. If this be the case, or even if the class is not easily ascertainable, the court might still allow the class action in order to punish an offending party. Many other courts in recent decisions have turned their attention from the distribution of damages, stressing instead the imposition of penalties on the offending parties.

The present case afforded the court an excellent opportunity to do equity, and in so doing, establish logical and reasonable standards for bringing a class action in Mississippi courts. The court would have done well to follow the example of other state courts which have relied upon the federal rules for guidance. Yet, instead, the court continued to apply standards which all states but Mississippi have abandoned,[29] and has

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action on behalf of 1,200 exhibitors who suffered damages as a result of a fire which destroyed McCormick Place (an exhibition hall) in Chicago. The court in allowing the action despite the obvious discrepancy in individual damages stated:

> A class action is superior to other available methods of adjudication.... A class suit will avoid the duplication of judicial effort and will prevent separate actions from reaching inconsistent results with identical facts . . . . Furthermore, the amounts at stake for some of the exhibitors may be so small that separate suits would be impracticable. . .

*Id.* at 157.

[28]Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 883, 198 P.2d 514 (1948). *See also* Czap v. Credit Bureau, 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1970).

[29]*See* Dugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971), where the court allowed the attorney general of New Jersey to collect a judgment for the benefit of all persons who had entered into a sales contract containing an unconscionable clause. *See also* Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971), *U.S. app. pndg.*, (action for fraud brought on behalf of all who had purchased food freezers and food from certain sellers); Diamond v. Oreamuno, 24 N.Y. 2d 494, 248 N.E. 2d 910, 287 N.Y.S.2d 300 (1970) (relief given to benefit investors who

virtually eliminated the class action as an effective tool for would-be litigants whose damages are not identical.[30]

*Thomas W. Tardy, III*

REAL PROPERTY — TIDELANDS — PUBLIC TRUST DOCTRINE — CONVEYANCE OF TIDELAND TO PRIVATE OWNER FOR PRIVATE PURPOSE INVALID: STATE NOT ESTOPPED FROM ASSERTING TITLE

Appellant brought an action in the Chancery Court of Jackson County, Mississippi, to enjoin the state from entering upon certain islands and tidelands[1] located along the Pascagoula River and to cancel the state's claim of title to the land. Appellant claimed fee simple title to the tidelands originating from state patents issued pursuant to an 1884 act of the legislature,[2] and further claimed that if the 1884 act were found to be invalid, title remained in the appellant by virtue of equitable estoppel.[3] The state contended that the 1884 act was invalid and that title was in the state by virtue of the public trust doctrine. The chancery court held for the state, sustaining a general demurrer to the appellant's bill of complaint. On appeal to the Mississippi Supreme Court, *held,* affirmed. The public trust doctrine applies to islands that arise in the tidelands as a result of natural accretion and prohibits the sale of tidelands to private owners for private purposes; any such sale is invalid, and title remains in the state which is not estopped from asserting its title. *International Paper Co. v. State Highway Department,* 271 So. 2d 395 (Miss. 1972).

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had brought suit because of fraudulent security exchange members who had withheld information); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967): 26 U. MIAMI L. REV. 450 (1972).

[30]*See* Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,* 43 MISS. L.J. 287 (1972); Patterson & Patterson, *A Plea for Procedural Reform in Mississippi,* 42 MISS. L.J. 293 (1971).

[1]"In 1817 when Mississippi was admitted to the Union, this area was interspersed with islands and marshes and entirely subject to overflow from high tide. . . . Between 1817 and 1884 the elevation of the area increased due to natural accretion and portions of the area were no longer subject to overflow by high tide. . . ." International Paper Co. v. State Highway Comm'n, 271 So. 2d 395, 396 (Miss. 1972). The process of natural accretion has assumedly continued to the present day.

[2]Act of Mar. 15, 1884, ch. 17, [1886] Gen. Laws Miss. 22, the substance of which now appears in MISS. CODE ANN. § 4123 (1956).

[3]Appellant contended that the assessment and collection of taxes on the land, coupled with the failure to file suit to set aside the patent, estopped the state from asserting title to the land.

The public trust doctrine had its origins in Roman jurisprudence[4] and was subsequently adopted by early English common law.[5] The doctrine, which was inherited by American common law[6] in the colonial period, provided that lands subject to the ebb and flow of the tide are held by the state in trust for its people.[7] Under the early common law

[4]The authorities are not in complete agreement as to the specific nature of the trust under Roman law but the consensus is that the sea, harbors, and seashore were common to all, not owned by anyone, including the government, to be used primarily for purposes of navigation, commerce, and fishing. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 475 (1970), *quoting from* R. LEE, THE ELEMENTS OF ROMAN LAW 109-10 (4th ed. 1956); Note, *The Public Trust Doctrine in Tidal Areas: A Sometime Submerged Traditional Doctrine,* 79 YALE L.J. 762, 763-64 (1970), *quoting from* JUSTINIAN INSTITUTES 2.1.1.-2.1.6. *But see* Note, *Tideland Ownership - Time for Reform,* 36 U. CINN. L. REV. 121, 122 (1967), which suggests that the public trust concept resulted from a misunderstanding of Roman law.

[5]During the Dark Ages the concept of public ownership of tidal beds was eroded and the king asserted private proprietary rights over navigable waters and the beds thereof. The trend was halted by provisions of the Magna Carta (chapters 33 and 47; chapters 23 and 16, respectively, of the revised "Great Charter" of 1225), and it is from this document that the common law public trust doctrine evolved. Note, *The Public Trust Doctrine in Tidal Areas, supra* note 4, at 764-68. As ultimately developed, the public trust doctrine under English common law was that

> both the title and the dominion of the sea, and of the rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private . . . (ownership); and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.

Shively v. Bowlby, 152 U.S. 1, 11 (1893). The King could grant land beneath any arm of the sea, but any such grant was subordinate to the public rights in the water and soil so granted. Note, *The Public Trust Doctrine in Tidal Areas, supra* note 4, at 768, *quoting from* J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN THE TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 33-34 (1st ed. 1826) (The note then goes on to state that as a result of the commercial and industrial revolutions the concept is more akin to a public easement theory than a trust theory. *Id.* at 769-72).

[6]After the colonies won their independence from England, the ownership of and dominion over the tidelands passed to the original states. States subsequently admitted to the union assumed the same control over their tidelands as the original states exercised over theirs. Nelson, *State Disposition of Submerged Lands Versus Public Rights in Navigable Waters,* 3 NAT. RES. LAW 491, 495 (1970).

[7]Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). As developed in the United States, the doctrine was initially applied, as under English common law, only to lands subject to the ebb and flow of the tide. *See, e.g.,* Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). After it was recognized that the ebb and flow of the tide was the English common law test for navigability, The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454-55 (1851), the scope of the doctrine was expanded to apply to the Great Lakes, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 436-37 (1892) (apply-

the trust in the tidelands extends to the high tide mark,[8] and the traditional rights that were protected included navigation, commerce and fishing;[9] however, coverage has been expanded to include additional rights, most notably recreation.[10] The management and control of trust lands has been left to the states[11] which are limited in their power only by the restriction that any conveyance of trust lands must serve the public interest *or* not impair the public interest in remaining lands and waters.[12] Moreover, such lands are subject to a paramount federal interest in navigation and commerce.[13] As a result of the discretion accorded the states, public trust law has developed on a state-by-state basis, and consequently there is a lack of uniformity among the states.[14]

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ing the admiralty test of navigable-in-fact) and, on an individual basis, to waters navigable-in-fact in many states. Comment, *Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina: A History and Analysis,* 49 N.C.L. REV. 888, 895-96 (1971). Some states, however, have rejected the navigable-in-fact test and continue to apply only the ebb and flow test. *See, e.g.,* State *ex rel.* Rice v. Stewart 184 Miss. 202, 224-31, 184 So. 44, 47-50 (1938). Since Mississippi recognizes the public trust doctrine as applying only to tidelands, the scope of this casenote will be so limited. For a consideration of the broader application of the doctrine *see* Nelson, *supra* note 6, and Sax, *supra* note 4. Additionally, the public trust concept has been applied to public lands in the United States. For a discussion of this aspect of the doctrine *see* Montgomery, *The Public Trust Doctrine in Public Lands: Its Application to the Judicial Review of Land Classification Decisions,* 8 WILLAMETTE L.J. 135 (1972).

[8]Many states, including Mississippi, have adopted the English common law standard of mean high water as determined over an 18.6 year tidal cycle. Porro, *Invisible Boundary—Private and Sovereign Marshland Interest,* 3 NAT. RES. LAW. 512, 518 (1970); Note, *Tideland Ownership—Time for Reform,* 36 U. CINN. L. REV. 121, 127-28 (1967). Many others, however, consider mean low water as the boundary line. Porro, *supra.* At least one state applies a vegetation line test. Harkins v. Bel Pozzi, 50 Wash. 247, 310 P.2d 532 (1957). Beyond this abstract statement of the boundary, the actual physical location of the line of demarcation is very difficult. *See* Porro, *supra.*

[9]Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

[10]Treuting v. Bridge & Park Comm'n, 199 So. 2d 627, 633 (Miss. 1967); Comment, *Private Fills in Navigable Waters: A Common Law Approach,* 60 CALIF. L. REV. 225, 230-31 (1972).

[11]Nelson, *supra* note 6, at 745.

[12]Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

[13]*Id.* at 435.

[14]The development and application of the public trust doctrine has been so diverse among the states that the scope of a casenote does not permit an examination. For discussions of the doctrine in other jurisdictions *see* Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina,* 23 S.C.L. REV. 7 (1971); Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970) (Massachusetts, Wisconsin, and California); Comment, *Private Fills in Navigable Waters: A Common Law Approach,* 60 CALIF. L. REV. 225 (1972) (California and Washington); Note, Tideland Ownership—*Time for Reform,* 36 U. CINN. L. REV. 121 (1967) (New Jersey); Note,

The management of trust lands is primarily a legislative responsibility;[15] however, the courts perform a significant function by insuring that the public rights are not infringed.[16]

In Mississippi, statutes affecting the tidelands are strictly construed,[17] and the court has held that such statutes must not only be consistent with the public trust doctrine but must also be in the nature of a general law as opposed to a local or private law.[18] The courts have further held that the state is without the power to convey fee simple title in the tidelands to private owners for private purposes.[19] Any such conveyance is invalid, and conveys no interest in the land.[20] The state, however, can convey fee simple title in tidelands to private owners for private purposes if the public interest is served.[21] In addition the state can also convey a fee simple title in tidelands to private persons for public purposes.[22] Although the case law is not clear, there are indications that even after the state validly conveys fee simple title in tidelands, the trust still attaches.[23] In *Harrison County v. Guice,*[24] the court pointed out that littoral owners possess vested rights of navigation, boating, swimming, and fishing in contiguous tidelands.[25] These rights, however, are subordinate to the state's sovereign power to administer the use of the tidelands for the benefit of the public,[26] and if in the exercise of its

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*Conveyances of Sovereign Lands Under the Public Trust Doctrine: When are They in the Public Interest?,* 24 U. FLA. L. REV. 285 (1972); Note, *California's Tideland Trust: Shoring It Up,* 22 HASTINGS L.J. 759 (1971); Comment, *Maryland's Wetlands: The Legal Quagmire,* 30 MD. L. REV. 240 (1970); Comment, *Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina: A History and Analysis,* 49 N.C.L. REV. 888 (1971).

[15]*See, e.g.,* FLA. STAT. ANN. §253 (1962), *as amended,* (Supp. 1970); discussed in Note, *Conveyance of Sovereign Lands Under the Public Trust Doctrine: When are They in the Public Interest?,* 24 U. FLA. L. REV. 285, 292-305 (1972).

[16]*See* Cohen, *The Constitution, The Public Trust Doctrine, and the Environment,* 1970 UTAH L. REV. 388; Comment, *Private Action Under the Public Trust: An Environmental Bill of Rights for California,* 2 PAC. L.J. 620 (1971).

[17]*See* Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962). Generally speaking, Mississippi courts have been more restrictive in their application of the public trust doctrine. *Compare, e.g.,* Rogers v. City of Mobile, 277 Ala. 261, 169 So. 2d 282 (1964), *with* Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962).

[18]MISS. CONST. § 90(u), *construed in* Giles v. City of Biloxi, 237 Miss. 65, 112 So. 2d 815 (1959).

[19]Money v. Wood, 152 Miss. 17, 28-29, 118 So. 357, 359 (1928), *clarified in* Treuting v. Bridge & Park Comm'n, 199 So. 2d 627, 632 (Miss. 1967); *accord,* Rouse v. Saucier's Heirs, 166 Miss. 704, 146 So. 291 (1933).

[20]Money v. Wood, 152 Miss. 17, 30, 118 So. 357, 359 (1928).

[21]Treuting v. Bridge & Park Comm'n, 199 So. 2d 627, 633 (Miss. 1967).

[22]*Id.*

[23]*See* State *ex rel.* Rice v. Stewart, 184 Miss. 202, 230-31, 184 So. 44, 50 (1938).

[24]244 Miss. 95, 140 So. 2d 838 (1962).

[25]*Id.* at 107, 140 So. 2d at 842.

[26]Xidis v. City of Gulfport, 221 Miss. 79, 90-91, 72 So. 2d 153, 159 (1954).

sovereign powers, the state imposes a public use upon the tidelands that alters or destroys any of the littoral rights, the owner is not entitled to compensation as a result of the taking of the private property.[27] Therefore, in effect, the rights given to the private owners are but mere licenses.[28] In *Guice* the court further pointed out that littoral owners also possess a right of access to the water in order to exercise their vested rights.[29] To maintain this access, the littoral owner is entitled to any additional land that results from natural accretion or artificial accretion caused by strangers.[30] The littoral owner is entitled to such land even where the state is responsible for the artificial accretion unless the littoral owner is justly compensated for the taking of the property.[31] The littoral owner, however, cannot himself extend his ownership by filling in state-owned tideland.[32]

In the instant case the court held that the public trust applied to the islands resulting from accretion as well as to land still subject to inundation by tidewater. The court further held that since the trust prohibited alienation of the land to private owners for private purposes, it was beyond the power of the legislature to authorize such transfers, and any patent issued pursuant to the statute was invalid and did not pass title to the patentees and, consequently, to the appellant. The court then concluded that title to the land was in the state, not the appellant, and that the state was not estopped from asserting title to the tidelands even though it had not initiated an action to quiet title and had assessed and collected taxes on the land from appellant.

In a dissent to the denial of a petition for rehearing, Justice Smith argued that when a legislative enactment deals specifically with the subject matter of a common law rule, the statute supercedes the common law, and therefore, in the instant case, the public trust doctrine was inapplicable. He further argued that the public trust doctrine was inapplicable in the instant case because neither commerce, navigation, nor fishing were involved. Citing *Treuting v. Bridge & Park Commission,*[33] Justice Smith pointed out that under the public trust doctrine, conveyances of tidelands are permitted where a public interest is thereby served, and that the development of the subject land and the increase in the state's treasury from its sale and the collection of taxes thereafter was a sufficient public interest so that the conveyance was valid under

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[27]*Id.* at 93, 72 So. 2d at 158-59 (1954); Crary v. State Highway Comm'n, 219 Miss. 284, 296, 68 So. 2d 468, 472 (1953).

[28]Crary v. State Highway Comm'n, 219 Miss. 284, 293, 68 So. 2d 468, 471 (1953).

[29]Harrison County v. Guice, 244 Miss. 95, 107, 140 So. 2d 838, 842 (1962).

[30]*Id.*

[31]*Id.* The taking is not that of the land filled but that of the littoral right owner's access to the water and the consequent diminution in the value of his land. The holding in *Guice* (that the littoral owner is entitled to fee simple title to contiguous tideland filled in by the state at public expense) is of questionable validity, since, as pointed out in United States v. Harrison County, Miss., 399 F.2d 485 (5th Cir. 1968), it is in apparent conflict with MISS. CONST. § 95.

[32]Harrison County v. Guice, 244 Miss. 95, 107, 140 So. 2d 838, 842 (1962).

[33]199 So. 2d 627 (Miss. 1967).

the public trust doctrine. Finally, Justice Smith concluded that the state was equitably estopped from asserting title, and that the statute of limitations should be applied against the state to prevent it from asserting any title.

Although the Mississippi Supreme Court in past decisions has stated that the conveyance of tidelands to private owners for private purposes is invalid, this is the first decision in which the court has actually declared such a conveyance invalid and quieted title in the state. The decision also expands the scope of the doctrine, for the court ventures into heretofore unexplored areas of law surrounding the public trust doctrine, and establishes new and significant principles of law. One such principle is that title to islands formed by natural accretion within the tidelands is in the state and the public trust doctrine is applicable to the islands. Moreover, the court holds that equitable estoppel is not a basis for quieting title to tidelands in private owners, where the original conveyance is invalid.[34]

The decision should deeply disturb those who have believed mistakenly that they have a fee simple title to tidelands, for in reality, they do not; title to the land is in the state. The decision would not be so disturbing were it not for the implication that the state can successfully assert its title to the tidelands without providing the private owner with just compensation. Although such a taking without compensation is consistent with the public trust doctrine,[35] the failure to provide compensation smacks of injustice, particularly when the party asserting superior title is the state and is the very party that originally conveyed the land into private ownership and has since assessed and collected taxes on the land.[36]

Justice Smith, in his dissent, cogently argues against the application of the public trust doctrine in the instant case. He is indeed correct in his argument if the substance of the public trust doctrine is merely a common law rule. If, however, the substance of the doctrine is considered an inherent sovereign responsibility and a duty of the state, then the majority has properly prevented the legislature from violating

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[34]*Contra,* City of Long Beach v. Mansell, 3 Cal. 3d 462, 501, 476 P.2d 423, 451, 91 Cal. Rptr. 23, 51 (1970) (state and city estopped from asserting any rights, including public rights, to property); Trustees of Internal Improvement Fund v. LoBean, 127 So. 2d 98 (Fla. 1961) (state legally estopped from asserting title to tidelands when deed issued and taxes paid).

[35]Sax, *supra* note 4, at 479-80; *see* Xidis v. City of Gulfport, 221 Miss. 79, 72 So. 2d 153 (1954) (littoral owner not entitled to compensation when public use interferes with or destroys his rights in contiguous tidelands).

[36]The court's rejection of the estoppel claim would have been more palatable if it had developed some reasoning for the rejection and had supported this reasoning with some authority. It is interesting to note that Justice Patterson, who wrote the court's opinion in the instant case, wrote a specially concurring opinion in State v. Stockett, 249 So. 2d 388 (Miss. 1971) (relied on by appellent in instant case), reasoning that the state was equitably stopped from asserting title to certain swampland along the Pearl River near Jackson even though the patents were invalid. As pointed out in the instant decision, however, the cases can be distinguished.

this duty. Apparently the majority has adopted the latter view, and as a result the rejection of the equitable estoppel claim is more understandable.

The significance and application of the public trust doctrine can best be understood by considering it in relation to the gulf coast. The coast is an area of rapid growth, and there has been, and will continue to be, a strong tendency to utilize the tidelands to accommodate this expansion. Hasty and erroneous decisions could destroy the abundant coastal resources of Mississippi. In the public trust doctrine, courts have a viable means of protecting the public's interest in the tidelands;[37] however, private litigation, by itself, is neither an adequate nor efficient means to manage the vast tidelands of the state; rather, a comprehensive program administered by a state board or agency is needed to control the tidelands resources.[38] A regulatory board with the proper expertise and knowledge would be in a much better position to assertain and weigh all relevant considerations than would a court of law. The public trust doctine would still apply and judicial scrutiny would be available in the form of appeal.

*Robert T. Gordon, Jr.*

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[37]In considering the concept of "public interest" it must be remembered that there is no requirement that the concept be restricted to that of English common law. *Cf.* Mitchell v. State, 179 Miss. 814, 824, 176 So. 743, 745 (1937). The essence of the doctrine is that if the tidelands are to be used, they be used in a manner that serves the people as a whole and does not destroy the basic character of the tidelands.

# BOOK REVIEWS

FEDERAL CIVIL PRACTICE by HAROLD A. KOOMAN. Atlanta: The Harrison Company. 1969. 4 Volumes $152.00.

*William Joel Blass**

The practice of law in the United States is filled with ever-increasing complexities year by year. The volume of legal work is constantly growing. New fields of law are emerging while new concepts and approaches to old questions require the lawyer to constantly re-examine every area of law. With the increase in volume and the constantly changing patterns in the law, the practitioner finds himself always pressed for time.

A decade or two ago, there were many experienced, competent, and successful lawyers whose practice was confined almost entirely to the state courts. Today, however, this is no longer possible. Both by the legislative and the judicial process, the federal presence has been extended so that one is now necessarily engaged in the federal courts in matters which once were of purely local concern. We find ourselves in the federal court dealing with a very wide variety of subjects, and the volume of business is such that we cannot afford to waste our time in uncertainty about the procedural rules. It is to this problem that Mr. Kooman has addressed himself.

In the preface of this work, the author states that it is the purpose of these volumes to present a practical discussion of the Federal Rules of Civil Procedure. He points out that the Rules have been considered in more than 25,000 decisions, and he does not purport to analyze them all. Instead, he presents certain carefully chosen cases to illustrate the point being treated. The selection of those cases required great expertise and scholarship. In examining the cases and selecting those which tell us what we need to know, Mr. Kooman has performed a major service to the bar. Sometimes it is more difficult to decide what to leave out than what to include, as every professor has learned as he attempted to preface a new course. The practitioner simply is unable to study all of the cases on every procedural point, and he is constantly searching for a working tool in his library which will enable him to be adequately informed without being required to do the basic research himself.

Kooman's work first sets out the text of the rule, and then briefly states its history. There follows, then, a concise discussion as to the operation of the rule, adequately footnoted to decisions, committee reports, and statutes.

There are several excellent works in the area of federal civil practice which are already available to practitioners and students of the law. It is certainly no detraction from these works to say that Kooman's *Federal Civil Practice* fills a need which the others do not meet. It is

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thorough, accurate, authoritative, and it is stated in an admirably succinct manner. For example, in treating with the question of amended pleading and the relation between Rules 15 and 21, it is stated in section 15.04 that, "New parties cannot be brought into an action by an amendment as of course. Rule 21 provides that 'parties may be dropped or added by Order of the Court on Motion of any party.' In this respect, Rule 21 prevails over the provisions of Rule 15(a), and the procedure prescribed in Rule 21 must be followed." This short paragraph is footnoted to a number of decisions.

Only the first three volumes of the work dealing with Rule 1 through 37, are presently available, and this review is limited to those volumes. Hopefully the author will be able to sustain the same high quality of thoroughness and relative brevity throughout the remaining volumes. It is to be hoped, also, that the index to the remaining volumes may be somewhat more detailed than the first three. At present, the index refers only to sections. Occasionally a section may extend over several pages. In such a situation, the work would be of even greater utility to the busy practitioner if the index referred to both sections and pages.

The Kooman work will not take the place of all of the other works on federal civil practice. It is not designed to serve the same purpose as certain of the other works. When one considers the author's stated purpose — to present a practical discussion of the Federal Rules of Civil Procedure — it is evident that he has achieved his purpose. It is a very useful work and an important contribution to the bar.

CLOSE CORPORATIONS by F. HODGE O'NEAL. Chicago: Callaghan & Company. 1971. Pp 1176, 175. 2 volumes, loose leaf. $75.00; $25.00 a year for loose leaf service.

*Harry L. Case, Jr.**

Having served as corporate counsel for a concern that controlled approximately 200 close corporations and after practicing and teaching in the same field for a number of years, I think it only appropriate to begin by thinking Professor O'Neal on behalf of practitioners and law professors for making such a valuable tool available for our use. While differences of opinion must be expected as to the amount and even the method of coverage of certain areas of close corporations law, this treatise on close corporations is, in my opinion, unquestionably the very best work available.

Professor O'Neal's primary emphasis throughout the treatise is where it should be and that is on preventing problems that might arise in organizing or operating a closely held enterprise through planning, drafting, and counseling. In every chapter, the author devotes detailed treatment to the subject of advance planning for typical problems that arise in close corporations. Techniques in drafting are given considerable attention and emerge as the forte of Professor O'Neal's publication. So many times, after extensive research, a practitioner is still in a quandry

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about drafting solutions to his problems. Let's face it – legal publications generally do an excellent job in compiling statutory rules and the case law on a particular subject, but very few do much in the way of providing the practitioner with the compass needed to weave his way through his day to day problems. The treatise under review, however, does provide such a compass; its use can aid the practitioner in putting his clients' various business bargains in a form that will stand up to the ultimate tests of statutes and cases. The successful close corporations lawyer must practice preventive law. Realizing this, the author approached the subject in a manner aimed at preventing problems before they arise. In addition to detailed textual discussions of drafting problems and techniques, the publication contains a comprehensive set of forms which will serve as an excellent guide for the sojourner in the close corporation world.

As already noted, there will no doubt be differences of opinion as to the amount of coverage afforded the various areas of close corporations law. I suggest that such opinions, admittedly amounting to criticisms in some instances, will vary according to the experiences of the opinion holder. For example, from my experience the really tough problems, on a day to day basis, arise in the area of taxation. Based on this experience, I would probably argue that the treatise does not devote enough coverage to taxation. Nevertheless, in almost every area where applicable, Professor O'Neal has devoted sufficient material to taxation to raise red flags of danger for the practitioner. To do more in such a completely technical and highly specialized area as taxation would result in a work on taxation of close corporations rather than a general treatise on close corporations law as intended. I'm sure this same observation could be made in other areas. Thus, over all, the publication is an excellent tool for the busy practitioner. The index is good; the text contains clear discussions of day to day problems, and Professor O'Neal gives citations to leading cases, to other corporate texts, and to informative law review articles.

In case the impression has been given that Professor O'Neal's publication is primarily in the nature of a practical manual, it should be noted that he gives more than adequate treatment to legal theory. The author was obviously aware of the importance of that ingredient when he stated in his preface that, "In corporate practice, a sharp line cannot be drawn between the theoretical and the practical." Also, in many instances, Professor O'Neal identifies discernible trends in statutory development and judicial thinking.

Anyone familiar with Professor O'Neal's prior publications in the close corporations area would automatically expect a workmanlike job in any subsequent efforts. In the publication under review, Professor O'Neal has achieved this expectation with distinction.

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